87 540

No. ____

FILED
SEP 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GENERAL ADMINISTRATION OF CIVIL AVIATION OF THE PEOPLES REPUBLIC OF CHINA, a/k/a CIVIL AVIATION ADMINISTRATION OF THE PEOPLES REPUBLIC OF CHINA OR CAAC.

Petitioner,

—against—

LOUISE AGNES BARKANIC, Individually and as Personal Representative of the Estate of PETER PATRICK BARKANIC, Deceased,

GLADYS PATRICIA FOX, Individually and as Personal Representative of the Estate of DONALD BRANFORD FOX, Deceased,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN K. WEIR, ESQ.*
LOUIS R. MARTÍNEZ, ESQ.

HAIGHT, GARDNER, POOR & HAVENS
195 Broadway
New York, New York 10007
(212) 341-7000

Attorneys for Petitioner
The Department of International Affairs of the General Administration of Civil Aviation of the People's Republic of China

* *Counsel of Record*

QUESTIONS PRESENTED

I. Where a foreign sovereign has entered into a bilateral air treaty with the United States and defines therein the scope of its relinquishment of sovereign immunity, may a United States court nevertheless exercise subject matter jurisdiction beyond the scope of the treaty?

II. May a United States court properly exercise subject matter jurisdiction over a foreign government-owned air carrier under the first clause of section 1605(a)(2) of the Foreign Sovereign Immunities Act ("in which the action is based upon commercial activity carried on in the United States by the foreign sovereign"), in a wrongful death suit arising out of a foreign air disaster, where the accident occurred on a purely internal flight within the foreign sovereign's territory, and the parties did not enter into a valid contract in the United States to provide for the air transportation?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
TREATY AND STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
I. THE DECISION OF THE SECOND CIRCUIT RAISES AN IMPORTANT QUESTION FOR THIS COURT'S REVIEW BECAUSE IT FAILS TO GIVE EFFECT TO AN INTERNATIONAL TREATY BETWEEN THE UNITED STATES AND THE PEOPLE'S REPUBLIC OF CHINA.	8
II. THE DECISION OF THE SECOND CIRCUIT IMPERMISSIBLY EXPANDS THE JURISDICTION OF UNITED STATES COURTS OVER FOREIGN GOVERNMENT-OWNED AIR CARRIERS AND, BY IMPLICATION, OVER ALL FOREIGN SOVEREIGNS WHO CONDUCT BUSINESS IN THE UNITED STATES	11
III. THE SECOND CIRCUIT ERRED IN ITS INTERPRETATION OF THE GENERAL SALES AGENCY AGREEMENT BETWEEN CAAC AND PAN AMERICAN AND IGNORED ELEMENTAL PRINCIPLES OF CONTRACT AND AGENCY LAW	20

PAGE

CONCLUSION 23

APPENDIX

Opinions and Judgments Below

Court of Appeals Opinion of June 29, 1987 ..... 1a

District Court Opinion of October 17, 1986 ..... 8a

Treaty Involved

Agreement between the United States and the People's Republic of China Relating to Civil Air Transport 22a

Other Documents

General Sales Agency Agreement Between CAAC and Pan American 50a

Request Tickets Obtained in U.S. 61a-62a

Passenger Tickets Issued in China.....63a-64a

TABLE OF AUTHORITIES

Cases: PAGE

Aboujdid v. Singapore Airlines, Ltd. and Gulf Aviation, Ltd., 108 A.D.2d 330, 489 N.Y.S.2d 171 (1st Dept. 1985), *affirmed*, 67 N.Y.2d 450, 503 N.Y.S.2d 555 (1986) 16

Aboujdid v. Singapore Airlines and Gulf Aviation Ltd., 67 N.Y.2d 450, 503 N.Y.S.2d 555 (1986) 10, 16

Antar v. Trans World Airlines, 66 Misc.2d 93 (2d Dept. 1970), *affirmed*, 37 A.D.2d 1049 (2d Dept. 1971).... 22

Arango v. Guzman Travelers Advisors Corp., 621 F.2d 1371 (5th Cir. 1980) 19

Barnett v. Iberia Air Lines of Spain, No. 85C10265 (D.C. Ill. April 1987).....13, 17

Bucholtz v. Sirotkin Travel, Ltd., 74 Misc.2d 180 (Dist. Ct. Nassau Co. 1973), *affirmed*, 80 Misc.2d 333 (2d Dept. 1974) 22

Castillo v. Shipping Corp. of India, 606 F. Supp. 497 (S.D.N.Y. 1985) 17

Castro v. Saudi Arabia, 510 F. Supp. 309 (W.D. Tex. 1980)..... 10

Colleen M. Bryne v. Thai Airways International Ltd., 18 Av. Cas. ¶ 18,363 (N.D. Ill. 1984) 19

Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985)..... 10

Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056 (E.D.N.Y. 1979) 13, 14

In re Air Disaster at Riyadh Airport, 16 Av. Cas. (CCH) ¶ 17,880 (D.D.C. 1981).....13, 15

PAGE

Ingrassia v. Shell Oil Company, 394 F. Supp. 875 (S.D.N.Y. 1975) 22

Interocean Shipping Co. v. National Shipping and Trading Corp., 462 F.2d 673, 676 (2d Cir. 1972), *aff'd as modified*, 523 F.2d 527 (2d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976) 22

Kansas Power & Light Co. v. Burlington Northern, 740 F.2d 780 (10th Cir. 1984), *cert. dismissed*, 469 U.S. 1200 (1985) 22

Ministry of Supply, Cairo v. Universe Tankships, Inc., 708 F.2d 80 (2d Cir. 1983) 6, 19

Ostrander v. Billie Holm's Village Travel Inc., 87 Misc.2d 1049, 386 N.Y.S.2d 597 (Dist. Ct. Suffolk Co. 1976 22

Simpson v. Compagnie Nationale Air France, 42 Ill.2d 496, 248 N.E.2d 117 (S.Ct. Ill. 1969)..... 21

Sugarman v. Aeromexico Inc., 626 F.2d 270 (3d Cir. 1980)..... 18

Sumitomo Shoji of America v. Avagliano, 457 U.S. 176, 185 (1982) 10

The Amiable Isabella, 19 U.S. 1 (1821)..... 10

Tigchon v. Island of Jamaica, 591 F. Supp. 765 (W.D. Mich. 1984) 13, 17

Tote v. Iberia International Airlines, 649 F. Supp. 41 (E.D. Pa. 1986) 13, 16

Valentine v. United States, 299 U.S. 5 (1936)..... 10

Velidor v. L./P./G. Benghazi, 653 F.2d 812 (3d Cir. 1981) *cert. denied*, 455 U.S. 929 (1982)..... 18

PAGE

Vencedora Oceanica Navigacion v. Compagnie Nationale Algerianne, 730 F.2d 195 (5th Cir. 1984), *reh'g denied*, 734 F.2d 1479 (5th Cir. 1984) 13

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 7, 12, 17

Treaties:

Agreement Between the Government of the United States of America and the Government of the People's Republic of China Relating to Civil Air Transport, September 17, 1980, T.I.A.S. No. 10326, Av. L. Rep. (CCH) ¶ 26,321 .....2, 3, 8, 21

Convention for the Unification of Certain Rules Relating to International Transportation By Air, 49 Stat. 3000, 49 U.S.C. § 1502 *et seq.*, and the Montreal Agreement of 1966, CAB 18900, 31 Fed. Reg. 7302.. 4

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1330, 1441(d), 1602-1611 .....2, 5, 6, 7, 11, 12

Legislative History:

H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., *reprinted in*, 1976 U.S. Code Cong. & Ad. News 6604.....7, 12, 17

Other Documents:

Agreement between Pan American World Airways, Inc. and The Department of International Affairs of the General Administration of Civil Aviation of China Relating to Mutual Representation, November 18, 1980 ..... 4, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. ____

GENERAL ADMINISTRATION OF CIVIL AVIATION OF THE PEOPLES REPUBLIC OF CHINA, a/k/a CIVIL AVIATION ADMINISTRATION OF THE PEOPLES REPUBLIC OF CHINA OR CAAC.

Petitioner,

—VS.—

LOUISE AGNES BARKANIC, Individually and as Personal Representative of the Estate of PETER PATRICK BARKANIC, Deceased, and

GLADYS PATRICIA FOX, Individually and as Personal Representative of the Estate of DONALD BRANFORD FOX, Deceased,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is officially reported at 822 F.2d 11 and it is reprinted at page 1a of the Appendix to this Petition. The opinion and order of the District Court from which appeal was taken are not officially reported, are unofficially reported at 20 Av. Cas. (CCH) ¶ 17,402 (E.D.N.Y. 1986), and appear at page 8a of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 29, 1987. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY AND STATUTE INVOLVED

This case involves a bilateral international treaty entitled "Agreement Between the Government of the United States of America and the Government of the People's Republic of China Relating to Civil Air Transport," September 17, 1980, T.I.A.S. No. 10326, Av. L. Rep (CCH) ¶ 26,321, reprinted at page 22a of the Appendix. The case also involves the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1441(d), 1602-1611 (1976). Specifically at issue is the first clause of section 1605(a)(2) of the Act which provides:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case—
>
> * * *
>
> (2) in which the action is based upon commercial activity carried on in the United States by the foreign state;

28 U.S.C. § 1605(a)(2).

STATEMENT OF THE CASE

In this action, Respondents seek to recover $3 million for wrongful death damages on behalf of the estates of Peter Patrick Barkanic and Donald Branford Fox, passengers on a Russian-manufactured Antonov 24 aircraft which crashed at Jinan, People's Republic of China, on January 18, 1985, while being operated by Petitioner, the Department of International Affairs of the General Administration of Civil Aviation of the People's Republic of China (hereinafter referred to as "CAAC") as Flight 5109 between Nanjing and Beijing, exclusively within the People's Republic of China.

CAAC is a department under the State Council of the People's Republic of China, a branch of the Government with the responsibility of carrying on domestic and international transportation by air. It has its domicile and principal place of business in the People's Republic of China. CAAC conducts airline operations to and from the United States pursuant to a bilateral air treaty executed between the governments of the People's Republic of China and the United States promoting *international* civil air transportation. *See*, Agreement Between the Government of the United States and the Government of the People's Republic of China Relating to Civil Air Transport, September 17, 1980 T.I.A.S. No. 10326, Av. L. Rep. (CCH) ¶ 26,321, reprinted at page 22a of Appendix. In accordance with the terms of that treaty, CAAC received a Foreign Air Carrier Permit from the Civil Aeronautics Board[1] to carry out the agreed services set forth in Annex I of the bilateral air treaty. Permit to Foreign Air Carrier, November 26, 1980, issued by Civil Aeronautics Board Order 81-1-13, Docket 38775, November 26, 1980.

At the time of the accident, both passengers were travelling for business purposes aboard CAAC's aircraft pursuant to tickets issued and confirmed in China. Appendix at 9a, 63a, 64a. However, prior to departing Washington, D.C., Mr. Barkanic had obtained two ticket coupons requesting domestic transportation within China, from a private travel agent with whom his employer maintained a regular corporate account. The tickets issued to Mr. Barkanic were unconfirmed requests for transportation and, as a result, did not constitute a contract of carriage with CAAC. Appendix at 61a, 62a. Payment for the ticket coupons was made by Mr. Barkanic's employer to their travel agent nearly one month after the date of the accident.

---

1 Foreign Air Carrier Permits were formerly issued by the CAB under 49 U.S.C.A. § 1372. With the Civil Aeronautics Board Sunset Act of 1984, Pub.L.No. 98-443, 1984 U.S. Code Cong. & Ad. News 1703, Congress transferred this function to the Department of Transportation.

The record below clearly and unequivocally shows that the travel agent who issued the request tickets in the United States was never appointed or approved as an agent of CAAC. Although in furtherance of the bilateral air treaty CAAC and Pan American World Airways Inc. (hereinafter "Pan American") entered into a General Sales Agency Agreement which permits Pan American to act as a general sales agent in the United States, that agreement specifically provides that CAAC has the right to refuse appointment of such sales agents and to select directly sales agents in the United States. Agreement between Pan American World Airways, Inc. and the Department of International Affairs of the General Administration of Civil Aviation of China Relating to Mutual Representation, November 18, 1980 (hereinafter referred to as General Sales Agency Agreement), ¶ 2.1.7. Appendix at 52a. Moreover, the General Sales Agency Agreement specifically provides that valid documents for transportation may not be issued unless prior confirmation has been obtained. General Sales Agency Agreement ¶ 2.1.2, Appendix at 51a. The agreement deals exclusively with international transportation and does not provide that any private travel agent of Pan American will be permitted to issue confirmed tickets for travel on CAAC flights exclusively within China.

Proceedings in the District Court

Respondents commenced this action in the United States District Court for the Eastern District of New York by filing their complaint on May 22, 1985. They alleged causes of action premised upon negligent maintenance, operation, and control of the accident aircraft; negligent training of flight personnel; and negligent initiation of a landing. Significantly, the complaint does not allege any claims premised upon breach of contract, nor does it allege any cause of action pursuant to the Warsaw Convention[2] and makes no allegation that the flight

---

2 Convention for the Unification of Certain Rules Relating to International Transportation By Air, 49 Stat. 3000, 49 U.S.C. § 1502 *et seq.*, and the Montreal Agreement of 1966, CAB 18900, 31 Fed. Reg. 7302.

was "international transportation" within the meaning of Article 1 of the Convention. Respondents did assert, however, that CAAC had waived its sovereign immunity by virtue of holding a foreign air carrier permit to operate into the United States. Petitioner CAAC answered and denied all of the material allegations of the complaint and pleaded various affirmative defenses, including the defense of lack of subject matter jurisdiction. Subsequently, CAAC moved for dismissal for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1441(d), 1602-1611.

On October 17, 1986, the United States District Court for the Eastern District of New York issued its Memorandum and Order. Appendix at 8a. The District Court dismissed the complaint for lack of subject matter jurisdiction under the first clause of section 1605(a)(2) of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1441(d), 1602-1611. The Court found that there was no significant nexus between CAAC's commercial activities in the United States and the accident in China because the transportation requested by the decedents was for a domestic flight exclusively within the sovereign territory of the People's Republic of China and final arrangements and confirmation had to be made in China. Appendix at 17a. The District Court further found that, at the time decedents contacted CAAC in China to make the final arrangements for their flight, CAAC's office in Nanjing placed stickers on the original transportation requests, which indicated that the decedents would actually travel on Flight 5109 (the accident flight), not Flight 1508, as requested in the ticket coupons obtained in the United States. Appendix at 9a. The Court also found that under the clear and unambiguous language of the Foreign Air Carrier Permit, CAAC had not waived its sovereign immunity for purely internal flights over Chinese territory. Appendix at 20a-21a.

Proceedings in the Circuit Court of Appeals

Respondents sought review of the District Court's decision in the United States Court of Appeals for the Second Circuit. The appeal was limited to the jurisdictional issues under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1441(d), 1602-1611 ("FSIA"). Although the court found that CAAC had not waived its sovereign immunity by virtue of holding a foreign air carrier permit to operate into the United States, the Second Circuit neverthless reversed. Relying on its own prior decision in *Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80 (2d Cir. 1983), the Court concluded that under the first clause of section 1605(a)(2) of the FSIA (the "commercial activity" exception to sovereign immunity), a "nexus" existed between CAAC's commercial activities in the United States and the accident in China. The Court based its decision upon the fact that the ticket coupons requesting transportation in China were obtained and paid for in the United States. Appendix at 5a-6a.

The Court treated as irrelevant the following facts supported by the record below: (1) Respondents' claims arise out of the crash of an aircraft operated by CAAC on purely domestic flight wholly within the sovereign territory of the People's Republic of China; (2) the tickets issued to respondents' decedents requesting transportation were not issued by CAAC in the United States or by any of its designated agents; (3) CAAC did not receive payment for the tickets in the United States; in fact, payment for the flight was made to the travel agent nearly one month after the accident; (4) the tickets issued by the decedents' travel agent requesting transportation were not valid until confirmed by CAAC in China; and (5) at the time of the accident, decedents were travelling aboard Flight 5109, not Flight 1508 as requested on the tickets obtained in the United States.

REASONS FOR GRANTING THE WRIT

If allowed to stand, the decision of the Second Circuit will undoubtedly have a dramatic and deleterious impact upon relations between the United States and the People's Republic of China, and may affect U.S. relations with other foreign sovereigns. This case involves an important question of sovereign immunity affecting all foreign government-owned air carriers who conduct operations in the United States on the basis of bilateral civil air transport agreements. In its decision, the Second Circuit ignores a bilateral air treaty between the United States and the People's Republic of China relating to international civil air transportation. That treaty circumscribes the bounds under which both countries may operate airlines in each other's sovereign territory and limits the extent to which one party may intrude upon the other's sovereignty arising from this activity. In addition, the decision of the Second Circuit seriously undermines the uniformity and predictability that Congress and the Supreme Court have sought to achieve in decisions involving foreign sovereigns under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1441(d), 1602-1611 (hereinafter "FSIA"). *See*, H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., *reprinted in*, 1976 U.S. Code Cong. & Ad. News, 6604, 6606; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983). By exercising subject matter jurisdiction over CAAC in this instance, the Second Circuit exceeded the jurisdictional authority given United States courts under the FSIA. Although the Second Circuit purported to adopt the "nexus" approach in interpreting the first clause of section 1605(a)(2) of the FSIA (that is, that in order to exercise jurisdiction, there must be a significant connection between the foreign sovereign's commercial activities in the United States and the acts giving rise to the plaintiffs' claim), its formulation of the degree of connection required is inconsistent with the formulation of other circuit and district courts. Under the present state of the law, foreign sovereigns cannot reasonably predict when they will become subject to the jurisdiction of United States courts. This case gives the Supreme Court a

unique opportunity to define more clearly the standards under which a United States court may exercise jurisdiction over a foreign sovereign, thereby furthering Congressional intent to promote uniformity and predictability in decisions involving foreign sovereign immunity.

I. THE DECISION OF THE SECOND CIRCUIT RAISES AN IMPORTANT QUESTION FOR THIS COURT'S REVIEW BECAUSE IT FAILS TO GIVE EFFECT TO AN INTERNATIONAL TREATY BETWEEN THE UNITED STATES AND THE PEOPLE'S REPUBLIC OF CHINA

The decision below will have a substantial and dramatic impact upon relations between the United States and the People's Republic of China. Indeed, the impact of the Second Circuit's holding will have far-reaching implications for all governments who conduct commercial activities in the United States. The Court below disregarded an international treaty between the United States and the People's Republic of China. Acting in the spirit of the Joint Communique of December 15, 1978 establishing diplomatic relations between the two countries, the respective governments executed the "Agreement Between The Government of the United States of America and the Government of the People's Republic of China Relating to Civil Air Transport," September 17, 1980 T.I.A.S. No. 10326, Av. L. Rep. (CCH) ¶ 26,321, reprinted at page 22a of the Appendix, (hereinafter referred to as the "Air Transport Services Agreement").

The two nations executed the Air Transport Services Agreement in an effort to "develop mutual relations between their countries, to enhance friendship between their peoples, and to facilitate *international air transport*." *See*, Air Transport Services Agreement of September 17, 1980, Preamble, Appendix 23a (emphasis added). Significantly, the parties entered into this agreement "[o]bserving the principles of mutual respect for independence and sovereignty, non-interference in each other's internal affairs, equality and mutual benefit and friendly cooperation." *Id.*

In an effort to carry out the intentions of the parties under the treaty, the Civil Aeronautics Board issued a Foreign Air Carrier Permit setting forth the routes and terms of CAAC's operations in the United States. Permit to Foreign Air Carrier, November 26, 1980. *See* District Court Opinion, Appendix at 18a.

CAAC's Foreign Air Carrier Permit provides in relevant part that:

> (3) By accepting this permit, the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against the holder in any court or other tribunal in the United States (or its territories or possessions) *based upon any claim arising out of operations by the holder under this permit.*

District Court Opinion Appendix at 18a (emphasis added). No other waiver was executed either expressly or by implication. Thus, CAAC may raise the defense of sovereign immunity with respect to operations which are *not under the permit.* The language of the paragraph is clear and unequivocal.

To determine what constitutes "operations by the holder under the permit," one need only refer to the first page of the permit where the CAB grants CAAC authority to operate as follows:

> A. Between the coterminal points Beijing and Shanghai, People's Republic of China; the intermediate point Tokyo, Japan (or another point in Japan); and the coterminal points Honolulu, Hawaii; Los Angeles and San Francisco, California; and New York, New York, with an optional technical stop at Anchorage, Alaska.

CAAC may engage in charter foreign air transportation:

> B. Between any point or points in the People's Republic of China and any point or points in the United States; and

C. Between any point or points in the United States and any point or points not in the People's Republic of China or the United States.

Permit To Foreign Air Carrier, November 26, 1980, Paragraphs A, B, and C. *See*, District Court Opinion, Appendix at 20a. The above-described routes do not include purely internal flights within the People's Republic of China that have no connection with the United States. In fact, the Second Circuit held that the CAB permit "did not cover the entirely domestic flight between the terminal points of Beijing and Nanjing in China." Appendix at 3a.

It is abundantly clear that the applicable treaty and the permit issued pursuant to that treaty establish that CAAC agreed to waive its sovereign immunity only with respect to specific flights relating to international transportation and to no others.

As a sovereign state, the People's Republic of China retains jurisdiction over all claims arising out of accidents occurring on its airline on purely domestic flights. The government has never surrendered or waived that sovereign right. It is well-established that "a foreign state does not waive its sovereign immunity by merely entering into a contract with another nation. There must be an intentional and knowing relinquishment of the legal right." *Castro v. Saudi Arabia*, 510 F. Supp. 309, 312 (W.D. Tex. 1980); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377-378 (7th Cir. 1985); and *Aboujdid v. Singapore Airlines and Gulf Aviation Ltd.*, 67 N.Y.2d 450; 503 N.Y.S.2d 555, 558 (1986).

In the instant case, the Second Circuit disregarded the principle established in a number of Supreme Court decisions that treaties are to be construed liberally to give effect to the intention of the parties. *The Amiable Isabella*, 19 U.S. 1, 71 (1821); *Valentine v. United States*, 299 U.S. 5, 10 (1936); *Sumitomo Shoji of America v. Avagliano*, 457 U.S. 176, 185 (1982). There can be no doubt that under the Air Transport Services Agreement and the subsequent permit issued by the

CAB, the parties did not intend to relinquish their sovereign immunity with respect to purely domestic flights over their respective territories.

The People's Republic of China has the right to rely upon the representations of the United States Government as expressed in the treaties it executes and in the pronouncements made by its government agencies. The exercise of subject matter jurisdiction upon the tenuous basis found by the Second Circuit is in complete contravention of the Air Transport Services Agreement and of the legitimate expectations of the parties. Moreover, the Court's holding constitutes an unjustified transgression into the internal affairs and sovereignty of the People's Republic of China.

This Court should grant CAAC's petition for *certiorari* to resolve this important question of international law.

II. THE DECISION OF THE SECOND CIRCUIT IMPERMISSIBLY EXPANDS THE JURISDICTION OF UNITED STATES COURTS OVER FOREIGN GOVERNMENT-OWNED AIR CARRIERS AND, BY IMPLICATION, OVER ALL FOREIGN SOVEREIGNS WHO CONDUCT BUSINESS IN THE UNITED STATES

The Second Circuit's decision in *Barkanic v. CAAC*, if permitted to stand, will fundamentally alter the principles of sovereign immunity codified by Congress in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1441(d), 1602-1611 (hereinafter referred to as "FSIA"). The decision increases the confusion and uncertainty already plaguing this area of United States law. On the basis of an ill-perceived and tenuous connection between CAAC's commercial activity in the United States and an air disaster which occurred on a purely domestic flight over the sovereign territory of China, the Second Circuit impermissibly expanded its jurisdictional power over foreign sovereigns and chose to exercise subject matter jurisdiction over CAAC.

It is well established that Congress enacted the FSIA with the aim of clarifying the law with respect to suits against foreign state defendants. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. *reprinted in*, 1976 U.S. Code Cong. & Ad. News, 6604, 6606. In addition, because of the potential sensitivity of actions against foreign states, Congress intended to promote uniformity in decision-making with respect to questions of sovereign immunity. H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., *reprinted in*, 1976 U.S. Code Cong. & Ad. News, 6604, 6631; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983). Clearly, the decision of the Second Circuit does not promote the uniformity and predictability that Congress and this Court in *Verlinden*, *supra*, have sought to accomplish.

At issue here are the jurisdictional limits of United States courts under the first clause of section 1605(a)(2) of the FSIA (the commercial activity exception to sovereign immunity). That section provides in part:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case—
>
> * * *
>
> (2) in which the action is based upon commercial activity carried on in the United States by the foreign state;

28 U.S.C. § 1605(a)(2). This language has been the subject of widely varying and, at times, contradictory judicial interpretation. Of this section, the Fifth Circuit Court of Appeals has commented:

> Despite strong congressional intent to promote uniformity in decision making through judicial application of the first clause of section 1605(a)(2), judicial readings of this clause have not been consistent. Courts of Appeals and district courts have announced widely varying formulations of the jurisdictional scope of this clause, and these formulations may be divided into four categories: (1) a "literal" approach; (2) a "nexus" approach; (3) a bifur-

cated literal and nexus approach; and (4) a "doing business" approach.

Vencedora Oceanica Navigacion v. Compagnie Nationale Algerianne, 730 F.2d 195 at 199-200 (5th Cir. 1984), *reh'g denied*, 734 F.2d 1479 (5th Cir. 1984).

In the instant action, the Second Circuit stated that it was adopting the "nexus" approach, (Appendix at 5a) which, in theory, requires that a court determine whether there is a significant connection between the foreign state's commercial activity in the United States and the acts giving rise to the plaintiff's claims before exercising subject matter jurisdiction. *Vencedora*, *supra*, 730 F.2d at 199-200. However, in applying this test, the court did not identify any quantitative or qualitative standard to determine whether the "nexus" it found was sufficiently significant to warrant the exercise of subject matter jurisdiction. Instead, the Second Circuit merely looked at one fact: that unconfirmed ticket coupons requesting transportation in China were provided and paid for in the United States. CAAC submits that the great weight of prior case authority compelled the opposite conclusion, i.e. the link between CAAC's commercial activities in the United States and the claim was too attenuated to justify the exercise of subject matter jurisdiction. *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056 (E.D.N.Y. 1979); *Tigchon v. Island of Jamaica*, 591 F. Supp. 765 (W.D. Mich. 1984); *In re Air Disaster at Riyadh Airport*, 16 Av. Cas. (CCH) ¶ 17,880 (D.D.C. 1981); *Tote v. Iberia International Airlines*, 649 F. Supp. 41 (E.D. Pa. 1986).

Under the present state of the law, a foreign government-owned air carrier cannot reasonably predict when it will become subject to the jurisdiction of United States courts for activities within its own sovereign territory. *Barnett v. Iberia Air Lines of Spain*, No. 85C10265 (D.C. Ill. April 1, 1987) (available on LEXIS, Genfed Library, Dist file) provides the most recent example of how a court, faced with an analogous fact pattern, has reached exactly the opposite result. In *Barnett*, plaintiffs brought suit against Trans World Airlines

(TWA) and Iberia Air Lines of Spain for negligence, breach of contract, and punitive damages because they suffered a ruined vacation. None of the plaintiffs' claims were based on the Warsaw Convention. The plaintiffs had purchased tickets in the United States for a vacation in the Spanish Canary Islands. TWA sold plaintiffs tickets on a TWA flight from New York to Madrid, and on an Iberia Air Lines flight from Madrid to the Canary Islands. Because of problems at Madrid Airport, plaintiffs missed their scheduled Iberia flight and were unable to get another for their intended destination. Plaintiffs asserted jurisdiction over Iberia Air Lines under the first clause of section 1605(a)(2), alleging that TWA acted as Iberia's agent when TWA sold plaintiffs the Iberia tickets, much in the same manner as jurisdiction is asserted in the instant case. Because the contract which formed the basis for the action was formed in Chicago, plaintiff claimed that a sufficient connection existed between the acts of Iberia in Madrid and Iberia's commercial transaction with plaintiffs in Chicago to meet the requirements of the first clause of section 1605(a)(2).

Defendant Iberia moved to dismiss under the FSIA. Although Iberia conducts commercial activities and has offices in the United States, it claimed that these activities were not connected to Iberia's acts at the Madrid airport which gave rise to plaintiffs' claims. In holding that it lacked subject matter jurisdiction, the Court stated:

> The court thinks that the necessary nexus between the acts of Iberia in Madrid and the commercial activities of Iberia in the United States is missing. While the activities of TWA as agent for Iberia might be enough to confer jurisdiction over Iberia under a "doing business" test, the court believes that the acts of an agent are insufficient under the nexus approach.

Id.

Similarly, in *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056 (E.D.N.Y. 1979), plaintiff sought to recover wrongful death damages for an American tourist killed in a Moscow

hotel fire. Defendants were two state-owned Russian tourist services, one of which, Intourist Moscow, owned and operated the hotel and the other of which, Intourist USA, promoted tours to the USSR in New York. In dismissing the complaint, the Court held that the first clause of section 1605(a)(2) was not applicable to bring the defendants within the jurisdictional exception to sovereign immunity since no significant link existed between the commercial activity of the foreign sovereign in the United States and the plaintiff's claim. "The clause requires that the court action 'be based upon' the specific commercial activity carried on in the United States." *Id.* at 1061.

In *In Re Disaster at Riyadh Airport*, 16 Av. Cas. (CCH) ¶ 17,880 (D.D.C. 1981), a suit for the wrongful death of a passenger killed on a Saudi Arabian airline, the court likewise held that it lacked subject matter jurisdiction under the first clause of section 1605(a) (2) of the FSIA. The court stated:

> The court cannot assert jurisdiction over the Kingdom on the basis of the first clause. A 'commercial activity carried on within the United States by a foreign state' is defined in § 1603(e) to mean a 'commercial activity carried on by such state and having substantial contact with the action is based on a regular cause [sic] of commercial conduct within the United States, namely Saudi Arabian Airlines' business activities here. However, *the instant action is based upon an air disaster in Saudi Arabia not upon a commercial activity carried on within the United States.* The legislative history indicates that there must be a greater connection between the cause of action and the United States than exists in this case for the exception to apply. According to the legislative history, the exception includes "cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occuring in the United States . . . and indebtedness incurred by a foreign state." H. Rep. No. 94-1487 at 17. While this is

> not an exclusive list of examples, the examples all involve cases where there is a much closer nexus between the cause of action and the United States.

16 Av. Cas. at ¶ 17,881 (emphasis added).

In *Tote v. Iberia International Airlines*, 649 F. Supp. 41 (E.D. Pa. 1986), another wrongful death suit arising out of the crash of an Iberia 727 jet during a flight from Madrid to Bilboa, Spain, the Court held there was no jurisdiction and observed:

> Plaintiff in this case has failed to show the requisite nexus between his grievance, the airline's alleged negligence causing the crash and Iberia's commercial activity carried on in the United States. The factors present in *Sugarman* upon which the Court determined the plaintiff's claim was "based upon a commercial activity carried on [by Iberia] in the United States" 28 U.S.C. 1605(a)(2) (clause 1) are not present here. Unlike that of the Sugarman plaintiff, plaintiff's decedent's flight was a domestic flight within Spain, and plaintiff's tickets were not purchased in the United States, but Spain.

649 F. Supp. at 42-43.

The same analysis is echoed in *Aboujdid v. Singapore Airlines, Ltd. and Gulf Aviation, Ltd.*, 108 A.D.2d 330, 489 N.Y.S.2d 171 (1st Dept. 1985), affirmed, 67 N.Y.2d 450, 503 N.Y.S.2d 555 (1986), where airline passengers brought suit to recover damages from foreign state-owned airlines for injuries resulting from a hijacking of an aircraft enroute from Tel Aviv to Paris. In reversing the lower court and finding that there was no subject matter jurisdiction under the first clause of section 1605(a)(2), the Appellate Division of New York stated:

> An action cannot be held to be based upon a 'commercial activity' carried on here simply because a defendant does business here. A *close nexus* between the incident and the forum State is required; '[o]blique contacts with the United States wholly unrelated to the instant suit may not

> be considered.' (citations omitted) 'Commercial activity' is a more demanding test than the 'doing business' test of CPLR 301 (*see Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056, 1061; *Tigchon v. Island of Jamaica*, 591 F. Supp. 765, 767). The actions here are not based on any commercial activity carried on in this country; they arise from the defendants' alleged negligence that occurred in Bahrain and Abu Dhabi.

108 A.D.2d at 332, 33 (emphasis added). The New York Court of Appeals affirmed this conclusion. *See also*, *Tigchon v. Island of Jamaica*, 591 F. Supp. 765 (W.D. Mich. 1984); *Castillo v. Shipping Corp. of India*, 606 F. Supp. 497 (S.D.N.Y. 1985).

In stark contrast to these well-reasoned authorities lies the decision of the Second Circuit in this case. Here, neither CAAC nor its agents issued valid tickets for airline transportation to the decedents in the United States, and the tickets issued in this country had to be confirmed and validated in China. Indeed, the Second Circuit so recognized when it stated: "the tickets as issued [in Washington, D.C.] bore the legend 'RQY,' which in airline ticketing practice signifies that economy seating has been requested and that the entire transaction has not been finalized and must be confirmed." Appendix at 5a. Thus, the facts of the instant case are even further removed from the jurisdictional line than those in *Barnett*, *supra*. Despite significant countervailing authority, and this significant factual disparity, the Second Circuit reaches its determination of jurisdiction, in obvious contravention of the Congressional mandate for decisional uniformity, as articulated by this Court in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983). *See also*, H.R. Rep. No. 94-1487, 94th Cong. 2d Sess., *reprinted in*, 1976 U.S. Code Cong. & Ad. News, 6604, 6606, 6631.

The above-described confusion is engendered by the lack of guidance lower courts have received in interpreting the first clause of section 1605(a)(2). This works to the detriment of

foreign sovereigns conducting commercial activities in this country. A foreign sovereign has a legitimate interest and right to retain jurisdiction over actions arising from accidents occurring on government-owned aircraft where the flight is conducted exclusively within its borders and is not connected to international transportation. Yet under the interpretation espoused by the Second Circuit, this sovereign right is frustrated. In fact, under the Second Circuit's formulation of the "nexus" test, any link with the foreign state's commercial activity in the United States, no matter how insignificant or remote, would be sufficient to warrant the exercise of subject matter jurisdiction under the first clause of section 1605(a)(2). This approach clearly opens the floodgates for litigation in United States courts of many foreign controversies, including claims against government-owned air carriers who conduct business in this country. In this age of automation, computers, and the sophisticated interfacing of the various networks in the airline industry, it is relatively simple, under the Second Circuit's "nexus" formulation, to establish some act in the United States, however remote, that could be traced back to a foreign sovereign or its presumed "agents." As these systems are not peculiar to the airline industry, virtually all foreign sovereigns who conduct business in the United States would be susceptible to U.S. Court jurisdiction for acts which are at best, tangentially related to their U.S. activities.

Those decisions finding jurisdiction under the "commercial activity" exception have uniformly required significantly greater contacts before exercising subject matter jurisdiction over a foreign sovereign. *See Sugarman v. Aeromexico Inc.*, 626 F.2d 270 (3d Cir. 1980) (action for injuries sustained on an international flight against a government owned airline where the court found the significant nexus in the fact that the defendant actually flew the plaintiff from the United States to Mexico and back, and that plaintiff had purchased his confirmed tickets in the U.S.); *Velidor v. L./P./G. Benghazi*, 653 F.2d 812 (3d Cir. 1981) *cert. denied*, 455 U.S. 929 (1982) (where the court found the significant nexus in the fact that the ship

had sailed into a United States port carrying the plaintiffs on board); *Arango v. Guzman Travelers Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980) (action for injuries sustained in international travel against a government-owned airline where the court found the significant nexus in the fact that the defendant carried the plaintiffs from the United States and sold them tickets directly); and *Colleen M. Bryne v. Thai Airways International Ltd.*, 18 Av. Cas. ¶ 18,363 (N.D. Ill. 1984) (where the court found the significant nexus in the fact that the flight upon which plaintiff sustained her injury originated in the United States and so was connected to defendant's commercial activity here). Even the prior Second Circuit decision interpreting the first clause of section 1605 (a) (2) required more substantial connections than those existing in the case at bar. *See, Ministry of Supply, CAIRO v. Universe Tankships Inc.*, 708 F.2d 80 (2d Cir. 1983) (where the court found the significant nexus in the following facts: (1) the wheat damaged was carried from a United States port on a vessel under bills of lading pursuant to the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1300; (2) the wheat was purchased under a U.S. statute; (3) the legislative history of the FSIA lists transactions such as the one involved as conduct under section 1605(a)(2).

Furthermore, research has not revealed any case involving the transportation of passengers or goods wherein a United States Court has exercised jurisdiction over a foreign government-owned entity under the first clause of section 1605 (a) (2), where the passengers or the goods were not actually transported to or from the United States by the foreign sovereign. Hence, the decision in *Barkanic v. CAAC* is very much out of step with the thrust of prior case law.

In sum, CAAC submits that the decision of the Second Circuit is evidence of the uncertainty and unpredictability that a foreign sovereign who conducts commercial activities in the United States faces. United States courts should implement and administer clear and concise rules for the exercise of subject matter jurisdiction over foreign sovereigns, thereby

adhering to the Congressional intent embodied in the FSIA and permitting foreign soverigns to adjust their operations in accordance with clearly-defined jurisdictional guidelines. Supreme Court review will also serve to mitigate against a serious irritant to international relations, which in turn fosters an element of distrust of the United States Court system. It is respectfully requested that this Court review this very important issue and provide desperately-needed guidance and cohesion.

III. THE SECOND CIRCUIT ERRED IN ITS INTERPRETATION OF THE GENERAL SALES AGENCY AGREEMENT BETWEEN CAAC AND PAN AMERICAN AND IGNORED ELEMENTAL PRINCIPLES OF CONTRACT AND AGENCY LAW

In straining to find jurisdiction, the Second Circuit misinterpreted the plain and unambiguous language of the General Sales Agency Agreement executed between CAAC and Pan American, and ignored the very language of the tickets issued in Washington, D.C. Moreover, the court overlooked fundamental principles of contract and agency law which support CAAC's assertion of sovereign immunity.

Under the General Sales Agency Agreement, Pan American is to act as general sales agent for CAAC in the United States, and CAAC will perform reciprocal functions for Pan American in China. Appendix at 50a. According to the Second Circuit's analysis, provisions in the agreement give Pan American the authority both to select and appoint ticket agents in the United States and to receive revenue for flights on CAAC. Appendix at 5a. After reviewing these and other provisions, the court erroneously concluded that CAAC contracted with respondents' decedents in the United States through the agency of Pan American and the private travel agent in Washington, D.C. Appendix at 5a-6a.

The Second Circuit's holding is undermined by several important factors. First, the Court of Appeals erred in attempting to interpret the language of the General Sales Agency Agreement without considering the international treaty pursuant to which the agreement was made. The introductory paragraph of the General Sales Agency Agreement indicates that it was executed pursuant to the Air Transport Services Agreement between the Governments of the People's Republic of China and the United States signed on September 17, 1980, T.I.A.S. No. 10326, *reprinted in* Av.L.Rep. (CCH) ¶ 26,321, Appendix at 50a. One of the purposes of that treaty, as expressed in its preamble, was to "facilitate international air transportation." Av.L.Rep. (CCH) ¶ 26,321, Preamble, Appendix at 23a. The treaty goes on to define "international air service" as "air service which passes through the air space over the territory of more than one State." *Id.* at Article 1(g), Appendix at 25a. Thus, it is plainly evident that the treaty and the General Sales Agency Agreement were intended to encompass only international air transportation on the agreed services and no other. In addition, the General Sales Agency Agreement between CAAC and Pan American is replete with references to international transportation and makes no mention of domestic transportation. *See* ¶¶ 5.1, 5.2, 5.3, Appendix at 53a-54a. Hence, fairly interpreted, the General Sales Agency Agreement between CAAC and Pan American covers only international transportation, and no Pan American-designated travel agent could have issued a valid document for transportation for a domestic flight within the People's Republic of China. *See also*, General Sales Agency Agreement, ¶ 2.1.2 (where it states that documents valid for transportation cannot be issued unless reservations are "confirmed" by CAAC, Appendix at 51a); and ¶ 3.3 (where it states that neither Pan American nor its agents may vary or modify the terms of the Agreement, Appendix at 53a).

Second, it is well-settled in the common law that, absent an express grant of authority, the travel agent is the agent of the passenger. *Simpson v. Compagnie Nationale Air France*, 42

Ill.2d 496, 248 N.E.2d 117 (S.Ct. Ill. 1969); *Bucholtz v. Sirotkin Travel, Ltd.*, 74 Misc.2d 180 (Dist. Ct. Nassau Co. 1973), *affirmed*, 80 Misc.2d 333 (2d Dept. 1974); *Antar v. Trans World Airlines*, 66 Misc.2d 93 (2d Dept. 1970), *affirmed*, 37 A.D.2d 1049 (2d Dept. 1971); *Ostrander v. Billie Holm's Village Travel Inc.*, 87 Misc.2d 1049, 386 N.Y.S.2d 597 (Dist. Ct. Suffolk Co. 1976). Moreover, the record below unequivocally establishes that the travel agent in this case was not an agent of CAAC.[3] The very sales agency agreement which the Court of Appeals cites in support of its conclusion is devoid of any reference to the travel agent as being an authorized agent of the Airline. Nothing on the record suggests otherwise. By contrast, and as the District Court recognized, the record does contain the uncontradicted Affidavit of Mr. Wu Zhengyu which clearly states that the travel agent was not an agent of CAAC. Appendix at 9a.

Finally, the Second Circuit ignored the very language on the face of the tickets issued in the United States, and by so doing, ignored basic principles of offer and acceptance. It is well-established that a legally binding contract arises only when one party, the offeror, makes an offer and the party to whom the offer is made, the offeree, accepts. *Ingrassia v. Shell Oil Company*, 394 F. Supp. 875, 882 (S.D.N.Y. 1975). To be enforceable, the contract must be supported by consideration. *Id.* There can be no enforceable contract if the parties fail to agree on essential terms or if one of the parties has no intent to be bound. *Interocean Shipping Co. v. National Shipping and Trading Corp.*, 462 F.2d 673, 676 (2d Cir. 1972), *aff'd as modified*, 523 F.2d 527 (2d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); *Kansas Power & Light Co. v. Burlington Northern*, 740 F.2d 780 (10th Cir. 1984), *cert. dismissed*, 469 U.S. 1200 (1985).

---

3 Discovery has revealed that the Vanslycke and Reeside Travel Agency is the sole travel agency that makes travel arrangements for Mr. Barkanic's employer and has been making those arrangements for several years.

The request for transportation on the face of the ticket coupons must reasonably be interpreted as an offer to CAAC to enter into a contract for carriage. CAAC did not accept the offer until the decedents arrived in China, as evidenced by the stickers that CAAC placed on the coupons issued in the United States. Appendix at 63a-64a. It was then, and only then, that CAAC accepted decedents' offer and entered into a contract to provide transportation, and that activity occurred wholly within the sovereign territory of the People's Republic of China.

CONCLUSION

The decision of the Second Circuit Court of Appeals is in contravention to an international treaty between the People's Republic of China and the United States of America, and against generally accepted principles of international law. It also misapplies the "commercial activity" exception to sovereign immunity under the Foreign Sovereign Immunities Act. For these reasons, petitioner prays that a writ of certiorari to United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

JOHN K. WEIR, ESQ.*
LOUIS R. MARTÍNEZ, ESQ.

Haight, Gardner, Poor & Havens
195 Broadway
New York, New York 10007
(212) 341-7000

Attorneys for Petitioner
The Department of International Affairs of the General Administration of Civil Aviation of the People's Republic of China

**Counsel of Record*

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 881—August Term, 1986

(Argued March 3, 1987 Decided June 29, 1987)

Docket No. 86-7985

LOUISE AGNES BARKANIC, Individually and as Personal Representative of the Estate of Peter Patrick Barkanic, Deceased,

GLADYS PATRICIA FOX, Individually and as Personal Representative of the Estate of Donald Branford Fox, Deceased,

Appellants,

—v.—

GENERAL ADMINISTRATION OF CIVIL AVIATION OF THE PEOPLES REPUBLIC OF CHINA, a/k/a CIVIL AVIATION ADMINISTRATION OF THE PEOPLES REPUBLIC OF CHINA or CAAC,

Appellee.

Before:

OAKES and WINTER, *Circuit Judges*,
and ZAMPANO, *District Judge*.*

* Of the District of Connecticut, sitting by designation.

Appeal from a decision of the United States District Court for the Eastern District of New York, Charles P. Sifton, *Judge*, dismissing wrongful death claims arising out of the crash of a Chinese airliner inside China on the ground that plaintiffs failed to show an adequate nexus between the crash and the defendant's commercial activity in the United States as required by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2).

Reversed.

Daniel F. Hayes, Salibello, Hayes & Zahn, New York, NY, *for Appellants*.

John K. Weir, Haight, Gardner, Poor & Havens, New York, NY (Louis R. Martinez, of counsel), *for Appellee*.

OAKES, *Circuit Judge*:

This case involves a question of subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(2). Representatives of the estates of Peter Barkanic and Donald Fox, who were killed in the crash of a China Airlines plane enroute from Nanjing to Beijing, China, on January 18, 1985, brought this wrongful death action against CAAC, an agent of the Peoples Republic of China providing domestic and international air services to passengers traveling in, to, and from China. The United States District Court for the Eastern District of New York, Charles P. Sifton, Judge, dismissed their claims on the ground that the court lacked subject matter jurisdiction under the FSIA. We reverse.

CAAC was authorized to operate in the United States by the Civil Aeronautics Board in 1980. The authorization allowed CAAC to engage in scheduled foreign air transportation of persons between the coterminal points of Beijing and Shanghai in the Peoples Republic of China; the intermediate point Tokyo (or another point in Japan); and the coterminal points Honolulu, Los Angeles, San Francisco, and New York, with an optional technical stop at Anchorage. Attached to the CAB permit was a waiver of any defense of sovereign immunity from suit "based upon any claim arising out of operations by the holder under this permit." As originally granted, however, the CAB permit to CAAC did not cover the entirely domestic flight between the terminal points Beijing and Nanjing in China.

Since being issued the CAB permit CAAC has continued regularly scheduled flight operations into and out of San Francisco, Los Angeles, and New York, carrying passengers and freight for hire and making its schedules available to the traveling public. It maintains its own employees and offices at two locations in New York which are listed in public telephone directories. In addition, on November 18, 1980, CAAC entered into a bilateral interline traffic agreement with Pan American World Airways and a general sales agency agreement whereby Pan American was to act as general sales agent for CAAC in the United States and CAAC was to act as general sales agent for Pan American in the Peoples Republic of China. Under the agency agreement, Pan American has the authority both to select and to appoint ticket agents in the United States and to receive revenues for flights on CAAC.

Peter Barkanic and Donald Fox were American businessmen whose tickets for the China Airlines flight from Nanjing to Beijing were purchased from Vanslycke & Reeside Travel, Inc., Washington, D.C., an agent for Pan American World Airways, on January 9, 1985. It is undisputed that tickets issued for domestic flights in China in this manner must be confirmed by CAAC in China and, indeed, Barkanic and Fox did not travel on Flight 1508 departing 10:25 a.m. on January 18, 1985, as originally designated on the United States issued tickets. In-

stead, stickers attached to the original tickets indicate that the tickets were changed by the CAAC issuing office in Nanjing, China, to the ill-fated Flight 5109 departing at 5:05 p.m. on the same day. There is no evidence in the record that at that time this change in flights was made Barkanic and Fox were required to purchase new tickets or pay any additional fee. Flight 5109 crashed while attempting to land in poor weather at Jinan, China, killing Barkanic, Fox, and many others.

The district court dismissed this wrongful death action for lack of subject matter jurisdiction under the first clause of section 1605(a)(2) of the FSIA, 28 U.S.C. § 1605(a)(2).[1] The court found that there was no significant nexus between CAAC's commercial activities in the United States and the accident in China because the tickets issued in the United States were unconfirmed, were indeed changed as to flight number and departure time in China, and were for travel entirely within China. The district court also held that CAAC did not waive its defense of sovereign immunity by accepting the CAB foreign air carrier permit.

We have previously held, as the district court recognized that "[w]hen a foreign state has carried on a commercial activity within the United States, the first clause of § 1605(a)(2) . . . withdraws immunity with respect to claims based not only on acts within the United States but also with respect to acts outside the United States if they comprise an integral part of the state's 'regular course of commercial conduct' . . . 'having substantial contact with the United States.' " *Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80, 84 (2d Cir. 1983) (quoting 28 U.S.C. § 1603(d) & (e). Though the Fifth Circuit has suggested that an argument can be made that *Ministry of Supply, Cairo* approved a "doing business" inter-

---

1 Section 1605 reads in pertinent part as follows:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

. . . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state. . . .

28 U.S.C. § 1605.

pretation of clause one of section 1605(a)(2), it nevertheless felt that "this reading is too broad since the parties did not raise the 'doing business' issue." *Vencedora Oceanica Navigation, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 201 n.12 (5th Cir. 1984). We agree with the Fifth Circuit's reading of *Ministry of Supply, Cairo* and take it, as did the district court, that a nexus is required between the commercial activity in the United States and the cause of action. *See Vencedora Oceanica Navigacion*, 730 F.2d at 202; *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 820 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982).

Here the sales agency contract between CAAC and Pan American expressly permitted Pan American to perform the following functions on behalf of CAAC: "Handling of reservations for passenger . . . transportation and handling of all clerical work in connection therewith" (¶ 2.1.1), and "[i]ssuance and completion of passenger ticket and baggage checks, excess baggage tickets, airway bills and other traffic documents for passenger . . . transportation over the services of [CAAC]" (¶ 2.1.2). The agreement expressly says that "[t]he above-mentioned traffic documents issued by the General Sales Agent shall be honored and accepted by the Principal" (¶ 2.1.2), even though it was understood by Pan American that "no traffic documents valid for transportation on a particular flight will be issued unless advance reservation shall have been confirmed for the transportation and the payment of the relevant charges payable therefore [*sic*] shall have been received." (*Id.*) Here the tickets that were issued in Washington covered a specific flight, on a specific date, at a specific time. This is true even though the tickets as issued bore the legend "RQY," which in airline ticketing practice signifies that economy seating has been requested and that the entire transaction has not been finalized and must be confirmed.

In our view, by accepting in the United States payment for transportation between Nanjing and Beijing and by issuing tickets which, even though stickered in China, were accepted for the passage of the decedents on the ill-fated flight, CAAC

entered into a contract of carriage with the decedents. Payment of the fares was consideration for a commercial service to be performed by a commercial agency in China. Indeed, CAAC honored the contract it had entered into through the agency of Pan American and the Washington, D.C., travel agent by accepting the U.S.-issued tickets for the passage of the decedents on the date in question and, moreover, it was CAAC policy to accept or confirm such tickets. The reservation status of the tickets in our opinion simply makes no difference. Had, for example, the Chinese airline declined to carry Barkanic and Fox at all, they certainly would have had an action for breach of contract. It follows that there is a sufficient nexus between the airplane crash and the commercial activity carried on by CAAC in this country.

The two cases most relied upon as analogous by the district court, *In re Disaster at Riyadh Airport*, 16 Av. Cas. 17,880 (D.D.C. 1981), and *Harris v. VAO Intourist, Moscow*, 481 F.Supp. 1056 (E.D.N.Y. 1979), and a third case not cited by the district court, *Tigchon v. Island of Jamaica*, 591 F.Supp. 765 (W.D. Mich. 1984), are all readily distinguishable. In *Riyadh*, which involved the death of passengers during a fire in a Saudi Arabian Airlines aircraft on a scheduled domestic flight between Riyadh and Jeddah, Saudi Arabia, the plaintiffs were able to show only that the airline "did business" in the United States, without establishing any particular tie between its U.S.-based activities and the air disaster in Saudi Arabia. And in *Harris* and *Tigchon*, both involving hotels operated by their respective governments at which the plaintiffs-decedents were fatally injured, the hotels did not even do business in the United States. As the court said in *Harris*, "The commercial activity out of which plaintiff's claim arises is the operation of the Hotel in Moscow; despite the apparent integration of the Soviet tourist industry, the relationship between the negligent operation of the National Hotel and any activity in the United States is so attenuated that [§ 1605(a)(2)] is not applicable. . . . This civil court action is not based upon commercial activity in the United States." 481 F.Supp. at 1061. The *Tigchon* case was similar, with even less connection to commer-

cial activity in the United States in that the Jamaican government expressly denied that the tour operator that arranged plaintiffs' vacation was its agent or authorized representative.

The present case is closer to *Ministry of Supply, Cairo, supra*, where immunity was denied to the Egyptian government because it had arranged in the United States for a shipment of wheat from a United States port, although the grain was later rendered unusable in the course of off-loading in Egypt, or to *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379-80 (5th Cir. 1980), where the court denied immunity to Dominica Airlines for claims relating to events on a tour package it had directly sponsored for sale in the United States. We repeat that the fact that Barkanic and Fox were not guaranteed passage on a particular domestic flight in China is irrelevant since the tickets involved here were bought and paid for in the United States and available and used for passage on the fatal flight.

Judgment reversed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-85-1569

LOUISE AGNES BARKANIC, etc., *et alia*,

Plaintiffs,

—against—

GENERAL ADMINISTRATION OF CIVIL AVIATION OF THE PEOPLES REPUBLIC OF CHINA, etc.,

Defendant.

MEMORANDUM AND ORDER

SIFTON, *District Judge*

This is a wrongful death action arising out of a crash of a plane flying between Janjing [sic] and Beijing, China. Defendant, General Administration of Civil Aviation of the People's Republic of China a/k/a Civil Aviation Administration of the People's Republic of China, or CAAC ("CAAC"), is an agency or instrumentality of the People's Republic of China ("PRC"), having its principal place of business there. Jurisdiction is allegedly based on 28 U.S.C. § 1330 in that the claims are against a foreign state for which the foreign state is not entitled to immunity. This matter is now before the Court on defendant's motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to the Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1330, 1602-1611, or, in the alternative, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting defendant partial summary judgment limiting its liability to $20,000 pursuant to the applicable Chinese law.

The relevant facts do not appear to be in dispute. In this action, plaintiffs seek to recover $3,000,000 for wrongful death damages on behalf of the estates of Peter Barkanic and Donald Fox, who were passengers on an Antonov 24 aircraft manufactured in the USSR, which was being operated by CAAC personnel on a fight [sic] between Nanjing and Beijing within the People's Republic of China when it crashed in China on January 18, 1985.

Since the end of 1980, defendant CAAC has been conducting regularly scheduled flight operations into and out of San Francisco, Los Angeles and New York, carrying passengers and freight for hire. CAAC's schedules are available and advertised to the public. It maintains its own employees and offices at two locations within New York. Apparently, CAAC does not have its own sales agents. Instead, CAAC has appointed at least two general sales agents, Pan American and Northwest Airlines. Under the General Sales Agency Agreement with Pan Am, Pan Am has the authority to appoint ticket agents who can sell passenger and cargo transportation on CAAC and to receive revenues for flights on CAAC.

Both Barkanic and Fox were traveling aboard defendant's aircraft pursuant to tickets which had been issued by Vanslycke & Reese Travel Agency in Washington, D.C. Accordingly [sic] to the uncontradicted affidavit of Wu Zhengyu, government and legal officer in the International Affairs Department of CAAC, although CAAC accepts tickets issued by foreign travel agents of the airlines that have interline agreements with CAAC, tickets issued for domestic flights exclusively within the territory of the People's Republic of China must be confirmed by CAAC in China. In the instant case, according to the uncontradicted allegations of defendant, Barkanic and Fox did not travel on Flight 1508, departing 10:25 a.m. as originally designated on the U.S.-issued tickets. Instead, stickers attached to the original tickets indicate that plaintiffs' tickets were changed by CAAC's issuing office in Nanjing, China, to Flight 5109, departing 5:05 p.m.

According to the uncontradicted affidavit of Wu Zhengyu and legal opinion from Weng Siyu of China's Legal Counsel's office in Beijing, China:

> "With regard to the compensation for death or personal injury of passengers in accidents during domestic transportation by air within the People's Republic of China, the Financial and Economic Commission of the Government Administration Council of the Central People's Government of the People's Republic of China issued on April 24, 1951, the Rules of Compulsory Personal Accident Insurance for Passengers during Transportation by Air.
>
> "Article 5 of the Rules provides that the insured amount for each passenger, regardless of full fare, discounted fare or free tickets, will be the equivalent of 1,500 YUAN (approximately $500) and Article 10 of the Rules provides that the insured amount plus medical expenses provided for in the Rules shall be the maximum amount of liability. In May 1982, with the approval of the State Council for the People's Republic of China, the maximum amount for compensation for foreign passengers, in the event of personal accidents during domestic transportation by air within China was increased to $20,000 U.S. plus the maximum amount of compensation of $400 U.S. per person for loss or damage to hand baggage and $20 U.S. per kilo of check baggage. This is the limitation of liability applicable to all cases involving personal injury or death of a foreign citizen on board a domestic flight within the People's Republic of China since May 1982."

Affidavit of Wu Zhengyu, ¶ 7.

Defendant argues that this action should be dismissed for lack of subject matter and personal jurisdiction pursuant to the Foreign Sovereign Immunities Act ("FSIA") on the ground that a court may not assert jurisdiction over a "foreign state" under the first clause of § 1605(a)(2) of FSIA where a sufficiently significant nexus between plaintiffs' claims and the foreign state's commercial activities in the United States does not exist.

Defendant also argues that it did not waive sovereign immunity pursuant to § 1605(a)(1) by accepting a foreign air carrier permit. Defendant further contends that, even if this Court finds subject matter jurisdiction over CAAC under FSIA, this Court must apply Chinese law and grant an order for partial summary judgment limiting CAAC's liability to $20,000.

Plaintiffs argue that there is jurisdiction for their claims under the first clause of § 1605(a)(2) and under § 1605(a)(1). Plaintiffs also argue that FSIA does not affect choice of law rules and that under the choice of law rules of New York, the law of the decedents' domicile should be applied to the issue of damages. Finally, plaintiffs argue that applying Chinese law would contravene important federal and state policies.

For the following reasons, defendant's motion to dismiss is granted. FSIA is the sole basis for federal subject matter jurisdiction and personal jurisdiction over actions against foreign sovereigns or their entities. *See Ruggiero v. Compania Pervana de Vapores*, 639 F.2d 872 (2d Cir. 1981). Section 1330(a) provides:

> "The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil actions against a foreign state as defined in section 1603(a) of this title as to any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement."

There is no dispute that defendant CAAC qualifies as a "foreign state" as defined in § 1603(a) and (b) either as a "political subdivision of a foreign state" or as an "agency or instrumentality" of the People's Republic of China.

The statutory scheme of FSIA implements the doctrine of sovereign immunity but specifies several exceptions to that general rule; the only exception to sovereign immunity which arguably is applicable to the present action is that contained in the first clause of § 1605(a)(2), which provides:

> "A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case—
>
> > (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state."

This clause is clearly not limited to actions in which the particular misconduct complained of occurred in the United States. As the Third Circuit explained in *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (2d Cir. 1980):

> "[S]o limiting a construction is belied by the very next clause, which excepts from immunity an action 'based . . . upon an act performed in the United States in connection with a commercial activity of a foreign state elsewhere.' When Congress intended to limit the acts subjected to liability to acts carried out (or, as in the third clause, having direct effects) in the United States, the statute makes that limitation clear. It is a limitation that would be expected—perhaps even required by due process considerations—when, as in the situations addressed in the second and third clauses, the underlying 'commercial activity of the foreign state' takes place not in the United States but 'elsewhere.' It is a limitation not to be expected—and surely not required by due process considerations—when the acts complained of, although themselves extraterritorial, grow out of 'a regular course of commercial conduct,' which was 'carried on in the United States.' "

Id. at 273 (citations omitted). *See also Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80, 84 (2d Cir. 1983):

> "When a foreign state has carried on a commercial activity within the United States, the first clause of § 1605(a)(2) withdraws immunity with respect to claims based not only on acts within the United States, but also

> with respect to acts outside the United States if they comprise an integral part of the state's 'regular course of commercial conduct.' "

However, while this clause does not require that the misconduct complained of be committed in the United States, the clause cannot be interpreted as incorporating a simple "doing business" standard like that of many long-arm statutes. *See Harris v. VAO Intourist Moscow*, 48 F. Supp. 1056, 1061 (E.D.N.Y. 1979). The action must "be based upon" the commercial activity carried on in the United States. Thus, the inquiry in the present case has two parts. First, this Court must determine whether the defendant has had a "regular course of commercial conduct" in the United States; second, this Court must consider whether the conduct complained of that occurred outside the United States had a significant "nexus" with (*see Vecedora Oceanica Navigacian v. Compagnie Nationale Aloerienne de Navigacian*, 730 F.2d 195, 202 (5th Cir. 1984); *Sugarman v. Aeromexico, supra*, 626 F.2d at 273), or in other words whether the conduct comprised an "integral part of" (*see Cairo, supra* at 84), the commercial activity in the United States.

There is no dispute that defendant has engaged in substantial commercial activity in the United States. However, in spite of defendant's commercial presence in the United States, this Court must conclude that the instant action does not fall within the exception to sovereign immunity contained in the first clause of § 1605(a)(2). While the language and legislative history of the clause are, at best, unclear as to the closeness of the connection required between the facts of the alleged injury and the commercial activity in the United States, courts interpreting the clause have almost universally demand [sic] more significant nexus than that existing in the present case.

In *Harris v. VAO, Moscow, supra*, an American citizen was killed in a hotel fire in Moscow. Suit was brought against the two state-owned Soviet tourist services, one of which, Intourist Moscow, owned and operated by the hotel, and the other of which, Intourist USA, promoted tours between the United

States and the Soviet Union. Intourist USA maintained an office in New York and conducted substantial business there, promoting the use of Intourist Moscow's hotel facilities in Moscow. Visitors from the United States seeking accommodations in the Soviet Union made arrangements through private travel agents and final confirmations of those arrangements were made through Intourist Moscow. Chief Judge Weinstein of this Court found § 1605(a)(2) inapplicable in spite of the commercial activity of Intourist USA in the United States and what he described as "the apparent integration of the Soviet tourist industry," *id.* at 1061, between Intourist USA and Intourist Moscow. The court, recognizing that the services contracted for were to be performed exclusively within the sovereign territory of the Soviet Union, concluded that the relationship between the alleged negligent operations of the hotel and Moscow and "any activity in the United States" was too attenuated to hold that the action was "based upon" such activity. *Id.*

Harris is analogous to the instant case. Here, services to be performed exclusively abroad were arranged through a private travel agent. Moreover, as in *Harris*, these arrangements, made in the United States, had to be confirmed by the defendant in the defendant's own country.[1]

Also analogous is *In re Disaster at Riyadh Airport*, 16 Av. Cas. ¶17,880 (D.D.C. 1981), in which the court held that it lacked subject matter jurisdiction under the first clause of § 1605(a)(2). In *Riyadh*, plaintiffs brought suit seeking damages for the wrongful death of passengers killed in the crash of a Saudi Arabian Airlines aircraft on a scheduled domestic flight between Riyadh and Jeddah, Saudi Arabia. The plain-

---

1 In fact, the action's connection with the United States is even weaker in the present case than it was in *Harris*. Here, plaintiffs Barkanic and Fox did not travel on Flight 1508, departing 10:25 a.m., as originally designated on the U.S.-issued tickets. Instead, stickers attached to the original tickets indicate that plaintiff's tickets were changed by defendant's issuing office in Nanjing, China, to Flight 5109, departing 5:05 p.m. (Compare Exhibit A to the Affidavit of John K. Weir with Exhibit A to the Reply Affidavit of John K. Weir.)

tiffs contended that the action was "based upon" a regular course of commercial activity carried on in the United States, namely, Saudi Arabian Airlines' business activities in this country. Saudi Arabian Airlines had four offices in the United States conducting business in New York, Texas, California and Missouri. As in *Harris*, however, the commercial activities carried on in the United States were found to be too remote from the injury suffered by plaintiffs and their decedents to meet § 1605(a)(2).

Plaintiffs attempt to distinguish *Riyadh* on the ground that in *Riyadh*, as opposed to in the present case, none of the plaintiffs had bought their tickets in the United States. This distinction is, however, insignificant. As discussed above, the uncontradicted evidence is that plaintiffs' tickets, though issued in the United States, were not valid unless confirmed by defendant in China, and in fact plaintiffs did not travel on Flight 1508, as designated on the U.S.-issued tickets, but rather flew on Flight 5109, as designated on the confirmation stickers issued in China. Moreover, plaintiffs in the instant case obtained tickets in the United States from a private travel agent and not directly from the defendant. Barkanic and Fox no more engaged in a commercial transaction in the United States with defendant than did the plaintiffs in *Riyadh* engage in a commercial transaction with the foreign sovereign defendant in that case.

Decisions cited by plaintiffs which hold that subject matter jurisdiction exists under the first clause of § 1605(a)(2) are, in fact, consistent with the principles expressed in *Harris* and *Riyadh*. In *Sugarman, supra*, for example, plaintiff brought suit against the national airline of Mexico for injuries he sustained while awaiting a delayed flight bound for the United States at a Mexican airport. The district court dismissed the complaint for lack of subject matter jurisdiction under FSIA. In reversing the lower court and finding jurisdiction under the first clause of § 1605(a)(2), the Court of Appeals recognized that there must be a significant "nexus" between the plaintiff's grievance and the defendant's commercial activity carried on in the United States. *Id.* at 272. The court found this significant

nexus in the following facts: (1) the injury occurred at the mid-point of a round trip passage on Aeromexico that began and ended in the United States, (2) the plaintiff purchased his ticket in his home state, and (3) the injury claimed caused continuing suffering and economic loss to the plaintiff after he returned home. *Id.* at 273. The facts of *Sugarman* are in marked contrast to those in the instant case in which the accident flight was purely domestic within the territory of the foreign sovereign.

In *Ministry of Supply, Cairo v. Universe Tankships, Inc.*, *supra*, 708 F.2d 80, which dealt with claims arising from the discharge of cargo from ships at Port Said, Egypt, the government entity Ministry of Supply was engaged in the purchase of grain and its transportation from the United States to Egypt. According to the Ministry's complaint, the cargo transported from the United States was delivered "short or otherwise damaged." *Id.* at 82. Upon arrival of the ship of Egypt, delays in unloading ensued due to the cargo damage. A third party, Banabaft, which claimed to have suffered loss of the use of the ship in question while paying charter hire sums for the ship, intervened in the suit and cross-claimed against the Ministry. Ruling that the Ministry was not immune from the suit, the court stated:

> "Banabaft's claim is based upon the plaintiff's entire course of activity in arranging in the United States for the purchase of the wheat and its transportation to Egypt, not simply on the acts done (or not done) by plaintiffs in the course of unloading at Port Said."

Id. at 84. Even though Banabaft's claims arose from a failure of the Ministry to unload the ship promptly at Port Said, the Court found a significant nexus between that failure and the Ministry's commercial activities in the United States in the following facts: (1) the legislative history of FSIA specifically lists import-export transactions as conduct within the contemplation of the first clause of of [sic] § 1605(a)(2), (2) the wheat was purchased under a United States statute, (3) plaintiff arranged for the wheat's carriage to Egypt in the the United

States, and (4) the wheat was carried from a United States port or a vessel under bills of lading pursuant to the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300 *et seq. Id.* at 84.

Similarly, in *Gemini Shipping, Inc. v. Foreign Trade Organization for Chemicals and Foodstuffs*, 647 F.2d 317 (2d Cir. 1981), in which the charterer of a ship delivering grain that had been purchased by a company owned by Syria brought suit for breach of an alleged guarantee of demurrage, the Court of Appeals concluded that the suit was "based upon" defendant's commercial activity in the United States and found the requisite nexus on the following facts: (1) the case involved an import-export transaction which was conduct specifically covered by the first clause of § 1605(a)(2), (2) the purchase of the grain was made pursuant to a United States statute, (3) Syria received financing for the transaction from the Department of Agriculture, and (4) the legislative history of FSIA referred specifically to transactions under the applicable sale statute and indicated that the sales were within the scope of FSIA commercial exceptions. *Id.* at 319.

These cases, which require a significant link or aggregation of links to be present in order to support the exercise of jurisdiction over a foreign sovereign, stand in contrast to the instant case where the only connection between plaintiff's claims and defendant's commercial activities in the United States is that a private travel agent in the United States issued two unconfirmed tickets for a flight to be conducted exclusively in the People's Republic of China. Plaintiffs show no direct contact with defendant in the United States. Decedents did not travel from the United States aboard CAAC and were not scheduled to return to the United States on a CAAC aircraft or ticket. This Court must conclude that the connection presented in this case is not sufficient to justify exercise of jurisdiction under § 1605(a)(2).

Subsequent to oral argument of this motion, plaintiffs brought to this Court's attention an order to show cause issued by the United States Department of Transportation ("DOT") on January 21, 1986, which proposes to revise the language dealing with waiver of sovereign immunity of Foreign Air

Carrier Permits issued by DOT to foreign airlines. CAAC's present permit provides in relevant part:

> "By accepting this permit, the holder waives any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against it in any court or other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder under this permit."

DOT proposes to change the language of the permit to read:

> "[The holder shall w]aive any right it may possess to assert any defense of sovereign immunity from suit in any action or proceeding instituted against it in any court of other tribunal in the United States (or its territories or possessions) based upon any claim arising out of operations by the holder of this [permit]."

In the order to show cause, DOT explained that it believes air carriers owned by foreign governments waive any claim to sovereign immunity in United States courts by virtue of accepting a foreign air carrier permit, whether or not the transportation takes place between the United States and a foreign point or between two foreign points (*see* DOT Order 86-1-38, at 2). DOT admits, however, that the current language of the permit may not be interpreted in that fashion and therefore proposes to modify the language.

In light of DOT's order to show cause, plaintiffs argue that CAAC has waived its defense of sovereign immunity under § 1605(a)(1).

Since plaintiffs' contention presents matters outside the pleadings, this Court must, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, treat defendant's motion as one for summary judgment, to be disposed of as provided in Rule 56. Accordingly, defendant was given the opportunity to present materials made pertinent to their motion by Rule 56. After reviewing these materials, the Court concludes that summary judgment for the defendant should be granted.

As stated in *United States v. One Tintoretto Painting*, 691 F.2d 603 (2d Cir. 1982):

> "The standard under which a summary judgment motion is tested requires a showing 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Fed.R.Civ.P. 56(c). The burden rests on the moving party to demonstrate the lack of genuine fact issues. *Adickes v. S.H. Kess & Co.*, 398 U.S. 144, 157 (1970). In search of the record the court should resolve all ambiguities and inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). The possibility that a factual issue may exist will not defeat the motion, rather the party opposing summary judgment must indicate that a genuine dispute as to a material fact does exist. Uncertainty as to the true state of any material fact defeats the motion. *Quinn*, 613 F.2d at 445."

Id. at 606.

There is no dispute that for a foreign state to waive its sovereign immunity there must be an intentional and knowing relinquishment of the legal right. *See Frovola v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377-78 (7th Cir. 1985); *Castro v. Saudi Arabia*, 510 F. Supp. 309, 312 (W.D. Tenn. 1980). For this reason, provisions allegedly waiving sovereign immunity should be narrowly construed. As the court explained in *Zernicek v. Petroleos Mexicanos*, 614 F. Supp. 407, 411 (S.D. Tex. 1985), "[c]ourts rarely find that a nation has waived its sovereign immunity . . . without strong evidence that this is what the foreign state intended."

In the present case, there can be no genuine dispute as to whether CAAC intended to waive its sovereign immunity with respect to flights completely within China. The plain language of CAAC's foreign carrier permit provides that CAAC has waived its sovereign immunity only with respect to "operations

by the holder of [the] permit." Since the permit clearly does not concern flights between two Chinese cities like the flight at issue in the present case,[2] this Court must conclude that the permit unambiguously excludes purely domestic operations from the foreign sovereign immunity waiver.

While DOT, in the order to show cause, states that it believes that the clause in the present permit is ambiguous, neither DOT nor the plaintiffs make any attempt to show how an alternative reading of the clause is possible. If plaintiffs were not correct that by accepting the current permit CAAC waived the right to assert a defense of sovereign immunity in any situation, the clause "based upon any claim arising out of operations by the holder under [the permit]" would have no meaning. However, the plain meaning of the clause is to limit the waiver to specific kinds of claims, that is, to claims arising out of the operations with which the permit deals.

Therefore, since the language of the permit is unambiguous that CAAC did not waive a sovereign immunity defense with respect to claims arising out of purely domestic flights, it is appropriate to grant summary judgment to the defendants. *See, e.g., Tokio Marine & Fire Ins. v. McDonell Douglas Corp.*, 617 F.2d 936, 940 (2d Cir. 1980).

---

2 The permit authorizes CAAC to engage in scheduled foreign air transportation of persons, property and mail as follows:

> A. Between the coterminal points Beijing and Shanghai, People's Republic of China; the intermediate point Tokyo, Japan (or another point in Japan); and the coterminal points Honolulu, Hawaii; Los Angeles and San Francisco, California; and New York, New York, with an optional technical stop at Anchorage, Alaska.
>
> CAAC may engage in charter foreign air transportation:
>
> B. Between any point or points in the People's Republic of China and any point or points in the United States; and
>
> C. Between any point or points in the United States and any point or points not in the People's Republic of China or the United States.

Since there is no mention in the permit of purely domestic flights, such flights cannot reasonably be considered to be operations under the permit.

The Clerk is directed to enter judgment dismissing the complaint and to mail a copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, New York
October 17, 1986

/s/ CHARLES P. SIFTON
United States District Judge

S9.10:
10326

TREATIES AND OTHER INTERNATIONAL ACTS
SERIES 10326

AVIATION

Air Transport Services

Agreement Between the

UNITED STATES OF AMERICA
and the PEOPLE'S REPUBLIC OF CHINA

Signed at Washington September 17, 1980

with

Related Letter

and

Exchanges of Letters
Signed at Beijing September 8, 1980

[SEAL]

NOTE BY THE DEPARTMENT OF STATE

Pursuant to Public Law 89-497, approved July 8, 1966 (80 Stat. 271; 1 U.S.C. 113)—

> ". . . the Treaties and Other International Acts Series issued under the authority of the Secretary of State shall be competent evidence . . . of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof."

PEOPLE'S REPUBLIC OF CHINA

Aviation: Air Transport Services

Agreement signed at Washington September 17, 1980; Entered into force September 17, 1980. With related letter and exchanges of letters Signed at Beijing September 8, 1980.

AGREEMENT BETWEEN

THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA RELATING TO CIVIL AIR TRANSPORT

The Government of the United States of America and the Government of the People's Republic of China,

Desiring to develop mutual relations between their countries, to enhance friendship between their peoples, and to facilitate international air transport;

Acting in the spirit of the Joint Communique of December 15, 1978[1] on the Establishment of Diplomatic Relations between the United States of America and the People's Republic of China;

Observing the principles of mutual respect for independence and sovereignty, non-interference in each other's internal affairs, equality and mutual benefit and friendly cooperation;

Recognizing the importance of reasonable balance of rights and benefits between both Parties under this Agreement;

Being Parties to the Convention on International Civil Aviation opened for signature at Chicago on December 7, 1944;[2]

---

1 Department of State Bulletin, Jan., 1979, p. 25.

2 TIAS 1591, 6605, 6681; 61 Stat. 1180; 19 UST 7693; 20 UST 718. [Footnotes added by the Department of State.]

Have agreed on the establishment and operation of air transportation involving their respective territories as follows:

ARTICLE 1

Definitions

For the purpose of this Agreement, the term:

(a) "Aeronautical authorities" means, in the case of the United States of America, the Civil Aeronautics Board or the Department of Transportation, whichever has jurisdiction, and in the case of the People's Republic of China, the General Administration of Civil Aviation of China, or in either case any other authority or agency empowered to perform the functions now exercised by the said authorities;

(b) "Agreement" means this Agreement, its annexes, and any amendments thereto;

(c) "Convention" means the Convention on International Civil Aviation, opened for signature at Chicago on December 7, 1944, including

- any amendment which has entered into force under Article 94(a) of the Convention and has been ratified by both Parties, and
- any annex or any amendment thereto adopted under Article 90 of the Convention, insofar as such annex or amendment is effective for both Parties;

(d) "Airline" means any air transport enterprise offering or operating international air services;

(e) "Designated airline" means an airline designated and authorized in accordance with Article 3 of this Agreement;

(f) "Air service" means scheduled air service performed by aircraft for the public transport of passengers, baggage, cargo or mail, separately or in combination, for remuneration or hire;

(g) "International air service" means an air service which passes through the air space over the territory of more than one State;

(h) "Stop for non-traffic purposes" means a landing for any purpose other than taking on or discharging passengers, baggage, cargo or mail.

ARTICLE 2

Grant of Rights

(1) Each Party grants to the other Party the rights specified in this Agreement to enable its designated airline(s) to establish and operate scheduled air services on the route(s) specified in Annex I to this Agreement. Such route(s) and services shall hereinafter be referred to as "the specified route(s)" and "the agreed services" respectively.

(2) Subject to the provisions of the Agreement, the designated airline(s) of each Party, while operating the agreed services on the specified route(s), shall enjoy the following rights:

(a) to make stops at points on the specified route(s) in the territory of the other Party for the purpose of taking on board and discharging international traffic in passengers, baggage, cargo and mail; and

(b) subject to the approval of the aeronautical authorities of the other Party, to make stops for non-traffic purposes at points on the specified route(s) in the territory of the other Party.

(3) Nothing in paragraph (2)(a) of this Article shall be deemed to confer on the designated airline(s) of one Party the right of taking on at one point in the territory of the other Party traffic in passengers, baggage, cargo or mail destined for another point in the territory of the other Party (stopover and cabotage traffic), except the non-revenue traffic in personnel of such airline(s), their families, baggage and household effects, articles used by the representative offices of such airline(s), and aircraft stores and spare parts of such airline(s) of

either Party to carry on-line stopover traffic between the points on the specified route(s) in the territory of the other Party shall be subject to consultations at an appropriate time in the future.

(4) The operation of the agreed services by the designated airline(s) on routes over third countries shall be conducted on routes available to the airlines of both Parties, unless otherwise agreed.

(5) Charter air transportation shall be governed by the provisions of Annex II.

ARTICLE 3

Designation and Authorization

(1) Each Party shall have the right to designate in writing through diplomatic channels to the other Party two airlines to operate the agreed services on the specified route(s), and to withdraw or alter such designations. In the operation of the agreed services, the designated airlines may operate combination or all-cargo service or both.

(2) Substantial ownership and effective control of an airline designated by a Party shall be vested in such Party or its nationals.

(3) The aeronautical authorities of the other Party may require an airline designated by the first Party to satisfy them that it is qualified to fulfill the conditions prescribed under the laws and regulations normally applied to the operation of international air services by the said authorities.

(4) On receipt of such designation the other Party shall, subject to the provisions of paragraphs (2) and (3) of this Article and of Article 7, grant to the airline so designated the appropriate authorizations with minimum procedural delay.

(5) When an airline has been so designated and authorized it may commence operations on or after the date(s) specified in the appropriate authorizations.

ARTICLE 4

Revocation of Authorizations

(1) Each Party shall have the right to revoke, suspend, or to impose such conditions as it may deem necessary on the appropriate authorizations granted to a designated airline of the other Party where:

(a) it is not satisfied that substantial ownership and effective control of that airline are vested in the Party designating the airline or its nationals; or

(b) that airline fails to comply with the laws and regulations of the Party granting the rights specified in Article 2 of this Agreement; or

(c) that other Party or that airline otherwise fails to comply with the conditions as set forth under this Agreement.

(2) Unless immediate revocation, suspension or imposition of the conditions mentioned in paragraph (1) of this Article is essential to prevent further non-compliance with subparagraphs 1(b) or (c) of this Article, such rights shall be exercised only after consultations with the other Party.

ARTICLE 5

Application of Laws

(1) The laws and regulations of each Party relating to the admission to, operation within and departure from its territory of aircraft engaged in the operation of international air service shall be complied with by the designated airline(s) of the other Party, while entering, within, and departing from the territory of the first Party.

(2) The laws and regulations of each Party relating to the admission to, presence within, and departure from its territory of passengers, crew, baggage, cargo and mail shall be applicable to the designated airline(s) of the other Party, and the passengers, crew, baggage, cargo and mail carried by such

airline(s), while entering, within and departing from the territory of the first Party.

(3) Each Party shall promptly supply to the other Party at the latter's request the texts of the laws and regulations referred to in paragraphs (1) and (2) of this Article.

ARTICLE 6

Technical Services and Charges

(1) Each Party shall designate in its territory regular airports and alternate airports to be used by the designated airline(s) of the other Party for the operation of the agreed services, and shall provide the latter with such communications, navigational, meteorological and other auxiliary services in its territory as are required for the operation of the agreed services, as set forth in Annex III to this Agreement.

(2) The designated airline(s) of each Party shall be charged for the use of airports, equipment and technical services of the other Party at fair and reasonable rates. Neither Party shall impose on the designated airline(s) of the other Party rates higher than those imposed on any other foreign airline operating international air service.

(3) All charges referred to in paragraph (2) of this Article imposed on the designated airline(s) of the other Party and reflect, but shall not exceed, an equitable portion of the full economic cost of providing the facilities or services in question. Facilities and services for which charges are levied shall be provided on an efficient and economic basis. Reasonable notice shall be given prior to changes in charges. Each Party shall encourage consultations between the competent charging authorities in its territory and the airline(s) using the services and facilities, and shall encourage and competent charging authorities and the airline(s) to exchange such information as may be necessary to permit an accurate review of the reasonableness of the charges.

ARTICLE 7

Safety

(1) Mutually acceptable aeronautical facilities and services shall be provided by each Party for the operation of the agreed services, which facilities and services shall at least equal the minimum standards which may be established pursuant to the Convention, to the extent that such minimum standards are applicable.

(2) Each Party shall recognize as valid, for the purpose of operating the agreed services, certificates of airworthiness, certificates of competency, and licenses issued or rendered valid by the other Party and still in force, provided that the requirements for such certificates or licenses at least equal the minimum standards which may be established pursuant to the Convention. Each Party may, however, refuse to recognize as valid, for the purpose of flight above its own territory, certificates of competency and licenses granted to or rendered valid for its own nationals by the other Party.

(3) Each Party may request consultations concerning the safety and security standards maintained by the other Party relating to aeronautical facilities and services, crew, aircraft and operations of the designated airlines. If, following such consultations, one Party is of the view that the other Party does not effectively maintain and administer safety and security standards and requirements in these areas that at least equal the minimum standards which may be established pursuant to the Convention, to the extent that they are applicable, the other Party shall be informed of such views together with suggestions for appropriate action. Each Party reserves its rights under Article 4 of this Agreement.

ARTICLE 8

Aviation Security

The Parties reaffirm their grave concern about acts or threats against the security of aircraft, which jeopardize the safety of persons or property, adversely affect the operation of air services and undermine public confidence in the safety of civil aviation. The Parties agree to implement appropriate aviation security measures and to provide necessary aid to each other with a view to preventing hijackings and sabotage to aircraft, airports and air navigation facilities and threats to aviation security. When incidents or threats of hijackings or sabotage against aircraft, airports or air navigation facilities occur, the Parties shall assist each other by facilitating communications intended to terminate such incidents rapidly and safely. Each Party shall give sympathetic consideration to any request from the other Party for special security measures for its aircraft or passengers to meet a particular threat.

ARTICLE 9

Representative Offices

(1) For the operation of the agreed services on the specified route(s), the designated airline(s) of each Party shall have the right to set up representative offices at the points on the specified route(s) within the territory of the other Party. The staff of the representative offices referred to in this paragraph shall be subject to the laws and regulations in force in the country where such offices are located.

(2) Each Party shall to the maximum extent practicable ensure the safety of the representative offices and their staff members of the designated airline(s) of the other Party, as well as safeguard their aircraft, stores, and other properties in its territory for use in the operation of the agreed services.

(3) Each Party shall extend assistance and facilities to the representative offices and their staff members of the designated airline(s) of the other Party as necessary for the efficient operations of the agreed services.

(4) The designated airline(s) of each Party shall have the right to convert and remit to its country at any time on demand local revenues in excess of sums locally disbursed. Conversion and remittance shall be effected without restrictions at the prevailing rate of exchange in effect for current transactions and remittance and shall be exempt from taxation on the basis of reciprocity. Wherever the payments system between the Parties is governed by a special agreement, that special agreement shall apply.

ARTICLE 10

Personnel

(1) The crew members of the designated airline(s) of either Party on flights into and out of the territory of the other Party shall be nationals of the Party designating such airline(s). If a designated airline of either Party desires to employ crew members of any other nationality on flights into and out of the territory of the other Party, prior approval shall be obtained from that other Party.

(2) The staff of the representative offices of the designated airline(s) of each Party in the territory of the other Party shall be nationals of either Party, unless otherwise agreed. The number of such staff subject to the approval of the competent authorities of both Parties. Each designated airline shall be permitted such number of staff as is adequate to perform the functions described in this Agreement associated with the provision of the agreed services, and in no event shall be less than that permitted to any foreign airline performing comparable services. Each Party shall by diplomatic note notify the other Party of the authorities which shall be considered the competent authorities which shall be considered the competent authorities for purposes of this paragraph.

ARTICLE 11

Market Access

(1) Matters relating to ground handling pertaining to the operation of the agreed services may be agreed upon between the airlines of both Parties, subject to the approval of the aeronautical authorities of both Parties.

(2) The sale, in the territory of each Party, of air transportation on the agreed services of the designated airline(s) of the other Party shall be effected through a general sales agent(s). The designated airline(s) of each Party shall serve as general sales agent(s) for the designated airline(s) of the other Party unless such airline(s) is offered and declines such agency. The terms and conditions of each general sales agency agreement shall be subject to the approval of the aeronautical authorities of both Parties. The Parties shall ensure that, if either Party designates a second airline for provision of the agreed services, both designated airlines shall be given the opportunity to act as general sales agents for the designated airline(s) of the other Party on the same terms and conditions.

(3) Notwithstanding paragraph (2) of this Article, the designated airline(s) of each Party, in its representative office(s) in the territory of the other Party, may sell air transportation on the agreed services and on all of its other services, directly or through the agents of its own appointment. Any person shall be free to purchase such transportation in the currency of that territory or, in accordance with applicable law, in foreign exchange certificates or freely convertible currencies. In addition the representative office(s) may be used for management, informational, and operational activities of the designated airline(s).

(4) The general sales agent for a designated airline appointed in accordance with paragraph (2) of this Article shall be responsive to the preferences expressed by the traveling and shipping public regarding airline selection, class of services and other related matters.

ARTICLE 12

Capacity and Carriage of Traffic

(1) The designated airlines of both Parties shall be permitted to provide capacity in operating the agreed services as agreed by the Parties and set forth in Annex V of the Agreement. Within two and one-half years after the commencement of any agreed service under this Agreement, the Parties shall consult with a view to reaching a new agreement which shall apply to the provision of capacity.

(2) In keeping with the principles set forth in the Preamble to this Agreement, each Party shall take all appropriate action to ensure that there exist fair and equal rights for the designated airlines of both Parties to operate the agreed services on the specified routes so as to achieve equality of opportunity, reasonable balance and mutual benefit.

(3) The agreed services to be operated by the designated airlines of the Parties shall have as their primary objective the provision of capacity adequate to meet the traffic requirements between the territories of the two Parties. The right to embark on or disembark from such services international traffic destined for or coming from points in third countries shall be subject to the general principle that capacity shall be related to:

(a) traffic requirements to and from the territory of the Party which has designated the airline and traffic requirements to and from the territory of the other Party;

(b) the requirements of through airline operation; and

(c) the traffic requirements of the area through which the airline passes after taking account of local and regional services.

(4) Each Party and its designated airline(s) shall take into consideration the interests of the other Party and its designated airline(s) so as not to affect unduly the services which the latter provides.

(5) If, after a reasonable period of operation, either Party believes that a service by a designated airline of the other Party is not consonant with any provision of this Article, the Parties shall consult promptly to settle the matter in a spirit of friendly cooperation and mutual understanding.

(6) If, at any time, either Party is of the view that traffic is not reasonably balanced, that Party may request consultations with the other Party for the purpose of remedying the imbalanced situation in a spirit of friendly cooperation and equality and mutual benefit.

ARTICLE 13

Pricing

(1) Each party may require the filing with its aeronautical authorities of fares to be charged for transportation of passengers to and from its territory. Such filing shall be made sixty (60) days prior to the date on which the fares are proposed to go into effect. In addition, the aeronautical authorities of both Parties agree to give prompt and sympathetic consideration to short-notice filings. If the competent authorities of a Party are dissatisfied with a fare, they shall notify the competent authorities of the other Party as soon as possible, and in no event more than thirty (30) days after the date of receipt of the filing in question. The competent authorities of either Party may then request consultations which shall be held as soon as possible, an in no event more than thirty (30) days after the date of receipt of the request by the competent authorities of the other Party. If agreement is reached during consultations, the competent authorities of each Party shall ensure that no fare inconsistent with such agreement is put into effect. If agreement is not reached during consultations, the fare in question shall not go into effect, and the fare previously in force shall remain effective until a new after is established.

(2) If the competent authorities do not express dissatisfaction within thirty (30) days after the date of receipt of the filing of a fare made in accordance with paragraph (1) above, it shall be considered approved.

(3) Notwithstanding paragraph (1) above, each Party shall permit any designated airline to file and institute promptly, using short-notice procedures, if necessary, a fare for scheduled passenger services between a point or points in the United States of America and a point or points in the People's Republic of China, provided that:

(a) the fare is subject to terms and conditions as agreed in Annex IV to this Agreement, and such fare would not be less than 70 percent to the lowest normal economy fare approved for sale by any designated airline for travel between the same point or points in the United States of America and the same point or points in the People's Republic of China; or

(b) the fare on the specified route(s) (hereinafter, the matching fare) represents a reduction of an approved fare but is not below any approved fare or any combination of fares, whether or not approved, for the provision of international air service between the United States of America and the People's Republic of China (hereinafter, the matched fare), and is subject to similar terms and conditions as the matched fare, except those conditions relating to routing, connections, or aircraft type, provided that:

(i) if the matched fare is for services provided in whole or in part by a designated airline over the specified route(s), the designated airline(s) of the other Party shall be permitted to institute a matching fare over the specified route(s);

(ii) if the matched fare is for services provided in whole or in part by a designated airline over a route(s) other than the specified route(s), the designated airline(s) of the Party shall be permitted to institute a matching fare over the specified route(s)

which is not less than 70 percent of the lowest comparable approved fare, excluding discount fares;

(iii) if the matched fare is offered solely by a non-designated airline(s) over the specified route(s), a designated airline shall be permitted to institute a matching fare over the specified route(s) which is not less than 70 percent of the lowest comparable approved fare, excluding discount fares; and,

(iv) if the matched fare is offered solely by a non-designated airline(s) over a route other than the specified route(s), a designated airline shall be permitted to institute a matching fare over the specified route(s) which is not less than 80 percent of the lowest comparable approved fare, excluding discount fares.

The Parties shall review the practice of matching of fares before the end of three years after commencement of any agreed service.

Each Party also agrees to apply subparagraph (b), *mutatis mutandis*, to fares of the designated airline(s) of the other Party for the provision of international air service between the territory of the first Party and a third country.

If, under the terms of subparagraph (b), a designated airline institutes a lower normal economy fare than the fare, or fares, put into effect pursuant to paragraph (1) of this Article, the normal economy fare for the purpose of establishing the 30 percent zone of pricing flexibility set forth in subparagraph (a) shall remain unchanged absent mutual agreement of both Parties.

Nothing in subparagraph (a) or (b) shall be construed as requiring a designated airline to institute any specific fare.

(4) (a) Each Party may require the filing with its aeronautical authorities of rates to be charged for transportation of cargo to and from its territory by the designated airlines(s) of the other Party. Such filing shall be made forty-five (45) days prior to the date on which the rates are proposed to go into effect. In addition, the aeronautical authorities of both Parties

agree to give prompt and sympathetic consideration to short-notice filings of the designated airlines.

(b) The competent authorities of each Party shall have the right to disapprove cargo rates. Notices of disapproval shall be given within twenty-five (25) days after receipt of the filing. A rate which has been disapproved shall not go into effect, and the rate previously in force shall remain effective until a new rate is established.

(c) A Party shall not require the designated airline(s) of the other Party to charge rates different from those it authorizes for its own airline(s) or those or other countries.

(5) Notwithstanding the provisions of this Article, each Party shall permit any designated airline to file and institute promptly, using short-notice procedures, if necessary, a fare or rate identical to that offered by any other designated airline in accordance with the provisions of this Article for transportation between the same points and subject to comparable terms and conditions.

(6) Each Party shall by diplomatic note notify the other Party of the authorities which shall be considered the competent authorities for purposes of this Article.

ARTICLE 14

Customs Duties and Taxes

(1) Aircraft of the designated airline(s) of either party engaged in the operation of the agreed services, as well as their regular equipment, spare parts, fuel, oils (including hydraulic fluids), lubricants, aircraft stores (including food, beverages, liquor, tobacco and other products for sale to or use by passengers in limited quantities during the flight) and other items intended for or used solely in connection with the operation or servicing of the aircraft, which are retained on board such aircraft shall be exempt on the basis of reciprocity from all customs duties, inspection fees and other national charges on arrival in and departure from the territory of the other Party.

(2) The following shall also be exempt on the basis of reciprocity from aii customs duties, inspection fees and other national charges, with the exception of charges based on the actual cost of the service provided:

(a) aircraft stores introduced into or supplied in the territory of a Party and taken on board, within reasonable limits, for use on aircraft of a designated airline of the other Party engaged in the operation of the agreed services, even when these stores are to be used on a part of the journey performed over the territory of the Party in which they are taken on board;

(b) ground equipment and spare parts including engines introduced into the territory of a Party for the servicing, maintenance or repair of aircraft of a designated airline of the other Party used in the operation of the agreed services; and

(c) fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of a Party for use in an aircraft of a designated airline of the other Party engaged in the operation of the agreed services even when these supplies are to be used on a part of the journey performed over the territory of the Party in which they are taken on board.

(3) Aircraft stores, equipment and supplies referred to in paragraph (1) of this Article retained on board the aircraft of the designated airline(s) of either Party engaged in the operation of the agreed services may be unloaded in the territory of the other Party with the approval of the customs authorities of that other Party. The aircraft stores, equipment and supplies unloaded, as well as aircraft stores, equipment and supplies introduced into the territory of the other Party referred to in paragraph (2) of this Article, shall be subject to the supervision or control of the said authorities, and if required to fair and reasonable storage charges, up to such time as they are re-exported or otherwise disposed of in accordance with the regulations of such authorities.

(4) The exemptions provided for by this Article shall also be available where a designated airline of one Party has contracted with another airline, which similarly enjoys such exemptions from the other Party, for the loan in the territory of the other Party of the items specified in paragraphs (1) and (2) of this Article. The treatment by a Party of a sale of any such item within its territory shall be determined by agreement of the Parties.

(5) Each Party shall use its best efforts to secure for the designated airline(s) of the other Party, on the basis of reciprocity, an exemption from taxes, charges and fees imposed by state or provincial, regional and local authorities on the items specified in paragraphs (1) and (2) of this Article, as well as an exemption from fuel through-put charges, in the circumstances designated in this Article, with the exception of charges based on the actual cost of the services provided.

ARTICLE 15

Provision of Statistics

The aeronautical authorities of both Parties will consult from time to time concerning, and will provide, as agreed, statistics of traffic carried on the agreed services between the two countries.

ARTICLE 16

Consultations

(1) The Parties shall ensure the correct implementation of, and satisfactory compliance with, the provisions of this Agreement in a spirit of close cooperation and mutual support. To this end, the aeronautical authorities of the Parties shall consult each other from time to time.

(2) Either Party may, at any time, request consultations relating to this Agreement. Such consultations shall begin at the earliest possible date, in no event later than sixty (60) days from the date the other Party receives the request unless otherwise agreed.

(3) If any dispute arises between the Parties relating to the interpretation or application of this Agreement, the Parties shall, in a spirit of friendly cooperation and mutual understanding, settle it by negotiation or, if the parties so agree, by mediation, conciliation, or arbitration.

ARTICLE 17

Modification or Amendment

(1) If either of the Parties considers it desirable to modify or amend any provision of this Agreement or its annexes, it may at any time request consultations with the other Party, and such consultations shall begin within a period of ninety (90) days from the date of receipt of the request by the other Party unless both Parties agree to an extension of this period.

(2) Any modification or amendment to this Agreement or its annexes agreed upon as a result of the consultations referred to in paragraph (1) of this Article shall come into force when it has been confirmed by an exchange of notes through diplomatic channels.

ARTICLE 18

Entry into Force and Termination

This Agreement shall enter into force on the date of its signature and shall remain in force for three years. Thereafter, it shall continue in force but may be terminated by either Party by giving twelve months' written notice to the other Party of its intention to terminate.

DONE at Washington, this seventeenth day of September 1980 in duplicate, each copy in the English and Chinese languages, both texts being equally authentic.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA	FOR THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA
/s/ Jimmy Carter	/s/ Bo Yibo

ANNEX I

I. *First Route*

A. *For the United States of America*:

The first airline designated by the United States of America shall be entitled to operate the agreed services on the following route, in both directions:

New York, San Francisco, Los Angeles, Honolulu, Tokyo or another point in Japan, Shanghai, Beijing.

B. *For the People's Republic of China*

The first airlines designated by the People's Republic of China shall be entitled to operate the agreed services on the following route, in both directions:

Beijing, Shanghai, Tokyo or another point in Japan, Honolulu, Los Angeles, San Francisco, New York. Anchorage may be utilized as a technical stop in both directions on this route.

II. *Second Route*

Both parties shall consult during the first two years following the commencement of any agreed service to decide on a route for operation by the second designated airline of each Party. If the Parties have been unable to agree upon a second route by the end of the second year, the second designated airline of each Party shall be entitled to commence operation of the agreed services on the first route in both directions, and to operate such services thereafter until the Parties agree upon a second route. In such circumstances, the Parties shall continue to consult and to exercise their maximum effort to reach agreement upon a second route, it being understood that the establishment of a second route is a mutually shared objective of both Parties. In the meantime, the Parties shall take overall review of the specified routes.

III. *Extra Section*

In case any of the designated Airline(s) of either Party desires to operate additional sections on its specified route(s), it

shall submit application to the aeronautical authorities of the other Party three (3) days in advance of such operation, and the additional sections can be commenced only after approvals have been obtained therefrom.

Notes

(1) On or after the effective date of this Agreement, each Party is entitled to designate one airline for operation of the agreed services. Beginning two years after the commencement of any agreed service, a second designated airline of each Party may also commence the operation of the agreed services. If either Party does not designate a second airline, or if its second designated airline does not commence or ceases to operate any service, that Party may authorize its first designated airline to operate the agreed services in all respects as if it were also designated as a second airline.

(2) Each designated airline may at its option omit any point or points on the above routes on any or all flights in either or both directions, provided, however, that the agreed service it operates begins or terminates at a point on the specified route in the territory of the Party designating the airline.

(3) Before operation of service through another point in Japan, referred to in Section I of this Annex, that point shall be agreed upon by the Parties. If a designated airline of either Party desires to change the point served in Japan, that airline shall furnish six (6) months' notice to the aeronautical authorities of the other Party. Such change shall be subject to the concurrence of that other Party.

(4) Subject to the provisions of Annex V, the designated airline(s) of each Party may make a change of gauge in the territory of the other Party or at an intermediate point or points on the specified route(s) provided that:

(a) operation beyond the point of change of gauge shall be performed by an aircraft having capacity less, for outbound services, or more, for inbound services, than that of the arriving aircraft.

(b) aircraft for such operations shall be scheduled in coincidence with the outbound or inbound aircraft, as the case may be, and may have the same flight number; and,

(c) if a flight is delayed by operational or mechanical problems, the onward flight may operate without regard to the conditions in subparagraph (b) of this paragraph.

ANNEX II

Charter Air Transportation

(1) In addition to the operation of the agreed services by the designated airlines of the two Parties, any airline(s) of one Party may request permission to operate passenger and/or cargo (separately or in combination) charter flights between the territories of the Parties as well as between a third country and the territory of the Party to which the requests are addressed. Each Party may provide to the other Party by diplomatic note a list of airlines qualified under the laws of the first Party to provide charter air transportation.

(2) The application for charter flight(s) shall be filed with the aeronautical authorities of the other Party at least fifteen (15) days before the anticipated flight(s). The flight(s) can be operated only after permission has been obtained. Permission shall be granted without undue delay in the spirit of equality of opportunity for the airlines of both Parties to operate international charter air transportation, mutual benefit and friendly cooperation.

(3) The aeronautical authorities of each Party shall minimize the filing requirements and other administrative burdens applicable to charterers and airlines of the other Party. In this connection, the charterers and airline of a Party shall not be required by the other Party to submit more than the following information in support of a request for permission to operate a charter flight or a series of flights:

(a) Purpose of flight;

(b) Nationality of registration, owner and operator of aircraft;

(c) Type of aircraft;

(d) Either (i) identification marks and call signs of the aircraft, or (ii) flight number;

(e) Name of captain and number of crew members;

(f) The proposed flight plan (the air route, date, hours and destination);

(g) The identity of the charterer or charterers;

(h) The number of passengers, and/or the weight of cargo, on board; and

(i) The price charged by the airline to each charterer.

The information contained in the application for charter flight(s) and required by subparagraphs (d), (e) and (h) may be changed, subject to notification prior to each flight. Such changes shall be contained in the flight plan.

(4) In the event that either Party should have reasons to disapprove a particular charter flight or series of charter flights, it shall, under normal circumstances, give timely notification of the reasons therefor, and the applicant may, where appropriate, resubmit an application for approval of the requested flight or flights.

(5) Neither Party shall require the filing by airlines of the other Party of prices charged to the public for charter transportation originating in the territory of the other party, or a third country.

(6) The provisions of Articles 2(4), 4, 5, 6, 7, 9(2) and (4), 10, 11(1), and 14 and Annex III of this Agreement shall apply, *mutatis mutandis*, to charter air transportation.

ANNEX III

Technical Services

I. *Airports for Scheduled Service*

(1) In accordance with Article 6, paragraph (1) of this Agreement, airlines designated by the Government of the

People's Republic of China are assigned the following regular and alternate airports in the United States:

Regular Airports

New York	JFK International Airport
Los Angeles, California	Los Angeles International Airport
San Francisco, California	San Francisco International Airport
Honolulu, Hawaii	Honolulu International Airport
Anchorage, Alaska	Anchorage International Airport

Alternate Airports

Baltimore, Maryland	Baltimore-Washington International Airport
Boston, Massachusetts	Logan International Airport
Newark, New Jersey	Newark International Airport
Philadelphia, Pennsylvania	Philadelphia International Airport
Pittsburgh, Pennsylvania	Greater Pittsburgh Airport
Moses Lake, Washington	Grant County Airport
Oakland, California	Metropolitan Oakland International Airport
Ontario, California	Ontario International Airport
Stockton, California	Stockton Metropolitan Airport
Hilo, Hawaii	Hilo International/General Lyman Airport
Seattle, Washington	Sea-Tac International Airport
Kansas City, Kansas	Kansas City International Airport
Fairbanks, Alaska	Fairbanks International Airport
Washington, D.C.	Dulles International Airport

(2) In accordance with Article 6, paragraph (1) of this Agreement, airlines designated by the Government of the

United States of America are assigned the following regular and alternate airports in China:

Regular Airports

Beijing	Capital Airport
Shanghai	Honggiao Airport

Alternate Airports

Guangzhou	Baiyun Airport
Hangzhou	Jiangiao Airport
Tianjin	Zhangguizhuang Airport

II. *Airports for Charter Air Transportation*

Aircraft of the airline(s) of each Party engaged in the operation of charter air transportation approved by the aeronautical authorities of the other Party may utilize airports appropriately identified in the Aeronautical Information Publication of that other Party as available for international flights, and such other airports as may be approved by such aeronautical authorities.

III. *Air Routes*

All flight operations by aircraft of the designated airline(s) of one Party operated in the airspace of the other Party shall be over established airways/prescribed routes or as cleared by the appropriate air traffic control service. Each Party will make reasonable efforts to ensure that air routes entering and within their sovereign airspace are as direct as practicable in the interest of economy, efficiency and fuel conservation, including the establishment of arrangements with controlling authorities of adjacent airspace as appropriate.

IV. *Aeronautical Information*

(1) The aeronautical authorities of both Parties shall provide each other with their Aeronautical Information Publication.

(2) Amendments and additions to the Aeronautical Information Publication shall be sent promptly to the aeronautical authorities of the other Party.

(3) The International NOTAM Code shall be used in the transmission of Notices to Airmen (NOTAMs). When the NOTAM code is not suitable, plain English shall be used. Urgent NOTAMs shall be transmitted by the quickest available means to the aeronautical authorities of the other Party.

(4) Aeronautical information and NOTAMs shall be made available in the English language.

V. *Meteorological Services*

Mutually acceptable meteorological service shall be provided in accordance with standards and recommended practices, to the extent to which they are applicable, developed pursuant to the Convention of the World Meteorological Organization and International Civil Aviation Organization.

VI. *Radio Navigation and Communication*

(1) For the operation of agreed services on the specified routes, the Parties recognize the requirements for the establishment of point-to-point aeronautical communications between the two countries. The Parties shall hold consultations as to the measures and procedures for the establishment of such communications.

(2) The English language and internationally accepted codes and procedures in force shall be applied in air-ground and point-to-point communications.

ANNEX IV

Conditions of Discount Fares

Discount fares within the zone of pricing flexibility described in paragraph (3) of Article 13 of this Agreement shall be subject to conditions of the type generally applicable to same or similar fares in other international air transportation mar-

kets. Such discount fares shall be subject to conditions in not less than four of the following categories:

— Round trip requirements
— Advance-purchase requirements;
— Minimum-Maximum length of stay requirements;
— Stopover restrictions;
— Stopover charges;
— Transfer limitations;
— Cancellation refund penalties;
— Group size restrictions;
— Return travel conditions;
— Ground package requirements.

ANNEX V

Capacity and Carriage of Traffic

(1) The Parties agree that each designated airline shall have the right to operate two frequencies per week. If a Party does not designate a second airline, its first designated airline shall, upon the commencement of service by the second airline of the other Party or upon the passage of two years from the commencement of any agreed service, whichever is earlier, be entitled to add to its operation two frequencies per week. For purposes of this Agreement a frequency is: one (1) round trip flight of an aircraft having a maximum certified take-off gross weight not less than 710,000 pounds but not more than 800,000 pounds; one and one-half (1 1/2) round trip flights of an aircraft having a maximum certified take-off gross weight equal to or greater than 430,000 pounds but less than 710,000 pounds; and two (2) round trip flights of an aircraft having a maximum certified take-off gross weight of less than 710,000 pounds, it shall be entitled to one additional round trip flight of an all-freight configured aircraft having a maximum certified take-off gross weight of less than 430,000 pounds for every two frequencies. All unused frequencies may be accumulated by a designated airline and used at its discretion at any time. Any increase in frequencies during the first three years after commencement of any agreed service in excess of the frequencies as

mentioned above shall be subject to prior consultation and agreement between the Parties.

(2) With a view of realizing the objectives set forth in Article 12, paragraph (2), the Parties agree that there should be a reasonable balance of the traffic carried by their respective designated airline(s) on the specified route(s) in terms of number of passengers and tons of cargo taken up and put down in the territory of the other Party.

The consultations referred to in Article 12, paragraph (6) shall take place as soon as possible, and in no event later than thirty (30) days following the date of receipt of the request by the latter Party. The Parties shall undertake to reach agreement within thirty (30) days as to effective measures for remedying the imbalances situation and fully implement such agreed measures. In considering the measures to be undertaken, the Parties shall take into account all relevant factors, including commercial decisions of the designated airlines, load factors and actions of third parties. In case the agreed measures fail to remedy the imbalance within three months after their implementation, the Parties shall meet together to look into the cause of such failure and agree upon measures for remedying the imbalanced situation. In case the Parties fail to reach agreement on effective remedial measures, they shall look into the cause of the imbalance and consider amendments to this Agreement which may be required to eliminate such cause.

(3) The provision of paragraph (2) of this Annex is valid for three years from the date of commencement of any service under this Agreement. Not later than six months prior to the end of this three-year period, the Parties shall consult with a view to agreeing to the means to achieve reasonable balance of traffic referred to in paragraph (2) of this Annex.

AGREEMENT BETWEEN
PAN AMERICAN WORLD AIRWAYS, INC.
and
THE DEPARTMENT OF INTERNATIONAL AFFAIRS GENERAL ADMINISTRATION OF CIVIL AVIATION OF CHINA
RELATING TO MUTUAL REPRESENTATION

The Department of International Affairs of the General Administration of Civil Aviation of China and Pan American World Airways, Inc. (hereinafter referred to as the Contracting Parties), in pursuance of Article 11 of the Air Transport Agreement between the Government of the People's Republic of China and the Government of the United States of America signed in Washington, D. C. on September 17, 1980, hereby agree on mutual representation as follows:

Article One

RECIPROCAL APPOINTMENTS

1.1. The Department of International Affairs of the General Administration of Civil Aviation of China, hereinafter in this connection referred to as the Principal, appoints Pan American World Airways, Inc. as its General Sales Agent in the territory of the United States of America for the sale of passenger and cargo transportation.

1.2. Pan American World Airways, Inc., hereinafter in this connection referred to as the Principal, appoints the Department of International Affairs of the General Administration of Civil Aviation of China as its General Sales Agent in the territory of the People's Republic of China for the sale of passenger and cargo transportation.

1.3. Sales of a passenger and cargo transportation may be made directly by the Representative Offices of the Principal stationed in the Territory of the General Sales Agent, as permitted by the Air Transport Agreement. The General Sales

Agent shall be under the supervision of the Representative Offices of the Principal stationed in the Territory of the General Sales Agent.

Article Two

FUNCTIONS OF THE GENERAL SALES AGENT

2.1 Without in any way limiting the right granted to the Principal by the Air Transport Agreement to perform such functions in its Representative Offices, the General Sales Agent shall perform in the territory of its own country the following functions on behalf of the Principal:

2.1.1. Handling of reservations for passenger and cargo transportation and handling of all clerical work in connection therewith.

2.1.2. Issuance and completion of passenger ticket and baggage checks, excess baggage tickets, airway bills and other traffic documents for passenger, baggage and cargo transportation over the services of the Principal. The above-mentioned traffic documents issued by the General Sales Agent shall be honored and accepted by the Principal. Such traffic documents may provide for turning over to other air carrier(s) for onward carriage by them of passenger, baggage or cargo destined beyond points served by the Principal, and in such event the Principal shall act in accordance with standard industry practice governing such onward carriage. It is understood by the General Sales Agent that no traffic documents valid for transportation on a particular flight will be issued unless advance reservation shall have been confirmed for the transportation and the payment of the relevant charges payable therefore shall have been received in accordance with the tariffs and regulations of the Principal, and in case of absence of such confirmation, only "open date" traffic documents may be issued.

2.1.3. Arranging for reasonable distribution and display of timetables and such publicity materials it seems appropriate provided by and in accordance with the requirements of the Principal.

2.1.4. Causing or arranging for the consignments to be delivered to the receiving points designated by the Principal with respect to cargo transportation.

2.1.5. Handling of Prepaid Ticket Advice, including necessary reservation and issuance of ticket and baggage checks.

2.1.6. Promotion of passenger and to the operations of the services of the Principal.

2.1.7. Selecting and appointing sales agents in the territory of its own country provided that the Principal shall have the right to refuse appointment of such sales agents and to select directly by itself the sales agent in the territory of the General Sales Agent.

2.1.8. Giving instructions to and supervising its sales agents.

2.1.9. At the request of the Principal, contacting the appropriate departments and authorities of its own government on matters relating to the operations of the services of the Principal.

Article Three

Observance of Instructions and Tariffs

3.1. The Principal shall provide its rules, regulations, tariffs, conditions of carriage, timetables and other information necessary for the sale of transportation over its services to the General Sales Agent and shall provide any modification of or amendment to the foregoing as far as in advance as practicable.

3.2. The General Sales Agent shall accurately observe all the rules, regulations, tariffs, conditions of carriage, timetables and other such information provided by the Principal and shall be responsible for its sales agents doing the same.

3.3. The General Sales Agent shall not vary or modify or allow its sales agents to vary or modify the terms and conditions set forth in the conditions of carriage or other publications of the Principal.

Article Four

TRAFFIC DOCUMENTS

4.1. The General Sales Agent shall, in general, use its own traffic documents in selling transportation over the services of the Principal. However, the traffic documents of the Principal may also be used when it is agreed upon between both Parties.

4.2. The sales agents shall use the traffic documents of either the General Sales Agent or the Principal.

4.3. The Representative Office of the Principal stationed in the territory of the General Sales Agent may use its own documents when sales of passenger and cargo transportation are made directly by itself.

Article Five

COMMISSIONS

5.1. The Principal shall pay to the General Sales Agent commission at the following rates in respect of transportation sold on its services by the General Sales Agent:

9% in respect of international passenger transportation.
5% in respect of international cargo transportation.

5.2. The Principal shall pay to the General Sales Agent an overriding commission at the following rates in respect of sales made in the territory of the country of the General Sales Agent for transportation over its services:

3% in respect of international passenger transportation.
2.5% in respect of international cargo transportation.

Overriding commission shall not be payable in respect of transportation sold by the Principal in its Representative Offices or solely on the domestic air services of the Principal. The above-mentioned overriding commission shall be the sole remuneration for all services rendered by the General Sales Agent under this Agreement with the exception of out-of-pocket expenses defined in paragraph 5.7 below.

5.3. The Principal shall pay a commission of 5% of the charter price to the General Sales Agent for charter flights booked and sold on the international air services of the Principal.

5.4. No commission shall be payable in respect of tickets issued by the General Sales Agent against the Prepaid Ticket advice of the Principal. However, the General Sales Agent shall be entitled to a service charge of 3% of the ticket fare in such event.

5.5. No commission shall be paid on the following: mail transportation, excess baggage charges, baggage valuation charges, transportation sold in connection with official government travel at a government discount, airline employee or agency discounted tickets, taxes and fees on fares or rates, cargo insurance, non-airline charges at origin and destination. Commission shall be payable on cargo valuation charges.

5.6. If the Principal for any reason shall make or allow a refund of the whole or part of any fare or other charge for transportation sold by the General Sales Agent, no normal commission or overriding commission shall be payable to the General Sales Agent on any sum so refunded. The General Sales Agent shall reimburse the Principal for any commission which has already been paid in respect of any sum so refunded.

5.7. Out-of-pocket expenses, other than communications expense, are subject to the Principal's explicit authorization and are to be paid separately by the Principal to the General Sales Agent:

5.7.1. Expenses caused by special publicity or press campaigns;

5.7.2. Expenses in connection with the distribution of promotional material and/or timetables, unless distributed jointly with material/timetables of the General Sales Agent;

5.7.3. Taxes and duties in connection with expenses covered by this paragraph 5.7;

5.7.4. Any other expenses for the account of the Principal.

Article Six

ENDORSEMENTS

6.1. The Principal grants the General Sales Agent the authority to effect endorsement of the traffic documents of the Principal in the territory of the General Sales Agent, provided that in the city of the territory of the General Sales Agent where the Principal has a representative office, the consent of the representative office of the Principal for endorsement is required.

Article Seven

SETTLEMENT

7.1. Each Party shall render the other Party invoices covering charges applicable to the transportation performed and services rendered in accordance with this Agreement. Separate invoices shall be prepared for passenger, cargo (freight), excess baggage and miscellaneous charges. Invoices are acceptable within a period of one year as from the first day of the month subsequent to the month in which the transportation or service is provided. If one Party disagrees with any item in the invoice submitted by the other Party, it may bring forward a rejection memorandum to this effect. However, rejection memorandum is also acceptable within a period of one year after receipt of

the invoice from the other Party. All necessary vouchers and documents shall be attached to the invoice.

7.2. Invoice and settlement therefore shall be in terms of U.S. Dollars. The rates of exchange between the currencies used by each Contracting Party and the U.S. Dollar shall be the mean average exchange rate of the last five days ending on the 20th day of the month previous to the month of transportation performed and service rendered, as is generally applied in interline settlement.

7.3. Each Party shall send the other Party a monthly statement of account, showing all the invoices submitted to and all invoices received from the other Party in the preceding month. After both Contracting Parties have sent their statements of account, the balance of the statement payable to the creditor Party shall be remitted in U.S. Dollars by the debtor Party to the Creditor Party within thirty (30) days after receipt of such statement to the debtor. The charge for remittance shall be borne by the debtor Party. If the balance is in favor of Pan American World Airways, Inc., payment shall be made by U.S. Dollars to:

Pan American World Airways, Inc.
Sub-account "A",
Account No. 1257-0676
Citibank, N.A., 399 Park Avenue
New York, N. Y. 10022, U.S.A.

If the balance is in favor of the Department of International Affairs, General Administration of Civil Aviation of China, payment shall be made in U.S. Dollars to:

The Bank of China, Beijing
The People's Republic of China
For credit to the account of the Department of International Affairs, General Administration of Civil Aviation of China

7.4. In the event of one Party incurring an exchange loss due to delay by not fulfilling the above-mentioned obligation within the time limits prescribed or due to an error caused by

the other Party, such a loss shall be borne by the defaulting Party.

7.5. All correspondence as to the billing and the statement under the Agreement shall be addressed to:

Manager-Revenue and Interline Processing
Pan American World Airways, Inc.
Rockleigh Industrial Park
King Road
Rockleigh, N. J. 07647 USA

and

International Accounting Office
Department of International
Affairs
General Administration of Civil
Aviation of China
P. O. Box 638, Beijing
The People's Republic of China

Article Eight

LIABILITY AND INDEMNITY

8.1. Each Contracting Party shall indemnity and hold free and harmless the other Contracting Party and its sales agent(s) in respect of claims, liabilities, fines and expenses arising from or in connection with the transportation sold by the other Contracting Party or its sales agent(s), except in the case that such claims, liabilities, fines and expenses are due to the misconduct and negligence of the other Contracting Party or its sales agent(s).

8.2. The General Sales Agent shall be responsible to the Principal for the correct issuance of all the traffic documents (passenger tickets and baggage check, excess baggage tickets, exchange orders/miscellaneous charges orders, and consignment notes) for transportation over the services of the Principal, and shall be responsible for proper remittance in accordance with this Agreement, of the amounts due the Principal.

8.3. In the event that any claim is made against the Contracting Party entitled to be indemnified in accordance with paragraph 8.1 of this Article, such Party shall give prompt written notice to the other Party, and shall cooperate by furnishing promptly to the other Party at its request all pertinent data, papers, records and information which are at its disposal.

Article Nine

TRANSFER OF OBLIGATIONS

9.1. Unless otherwise provided in this Agreement, the General Sales Agent shall not assign, transfer or delegate the representation and/or other obligations as stipulated in this Agreement to any Third Party without written consent of the Principal.

Article Ten

HEADINGS

10.1. Headings are inserted in this Agreement for the purpose of reference and convenience only and in no way define, limit or describe the scope of intent of this Agreement.

Article Eleven

MODIFICATIONS OR ADDITIONS

11.1. Any disagreement of opinion and/or dispute arising between the Parties hereto from the implementation or interpretation of this Agreement shall be settled by prompt and friendly consultation between the Parties.

11.2. If one Party considers it desirable to modify and/or amend this Agreement, such Party may at any time notify the other Party in writing to effect such modification and/or amendment through consultation. Modifications of or additions to the Agreement must be approved in writing by both Parties.

11.3. Modifications and/or amendments referred to above shall come into force on the date as agreed upon by both Parties.

Article Twelve

COMMUNICATIONS

12.1. The General Sales Agent shall provide reasonable communication facilities for the sale of transportation over the services of the Principal.

Article Thirteen

AMENDMENT AND TERMINATION

13.1. In the event that a second airline is designated by the aeronautical authorities of the government of either Party, and such airline wishes to exercise its right under the Air Transport Agreement to become a General Sales Agent for either party, the Parties shall meet to negotiate appropriate adjustments to this Agreement.

13.2. If either Party desires to terminate this Agreement after the coming into force of this Agreement, it may at any time notify the other Party of such intention in writing, and this Agreement shall terminate sixty (60) days after the receipt of the notice by the other Party.

13.3. Such termination shall not relieve either Party from all obligations and liabilities incurred under this Agreement before the date of such termination.

Article Fourteen

GOVERNMENT APPROVALS

14.1. The terms and conditions of this Agreement shall be subject to the approval of the aeronautical authorities of the governments of both Parties.

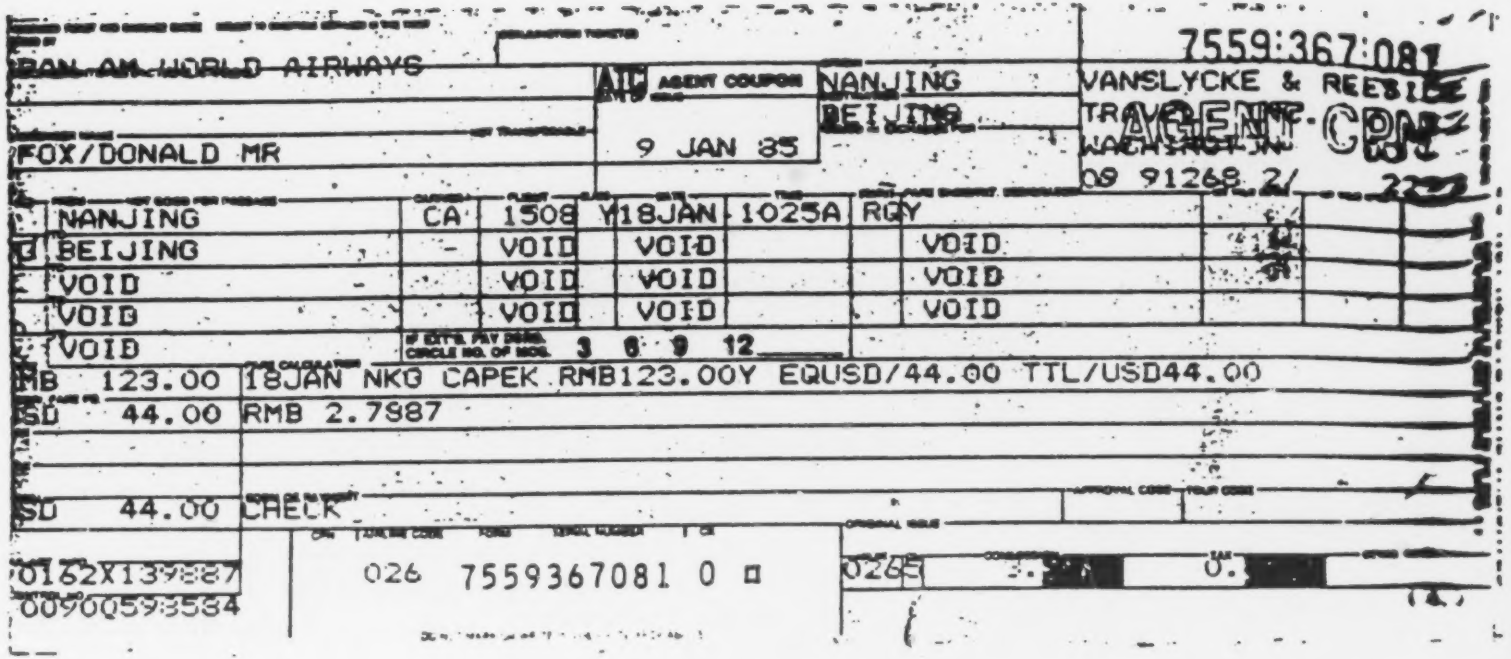
Article Fifteen

EXECUTION

15.1. This Agreement shall come into force from the date of its approval by the aeronautical authorities of the governments of both Parties. Done at New York on the 18th day of November, 1980, in duplicate.

FOR PAN AMERICAN WORLD AIRWAYS, INC.	FOR THE DEPARTMENT OF INTERNATIONAL AFFAIRS, GENERAL ADMINISTRATION OF CIVIL AVIATION OF CHINA
By _____	By _____

BEST AVAILABLE COPY



PAN AM WORLD AIRWAYS

AIC AGENT COUPON

NANJING
BEIJING

9 JAN 85

7559:367:081

VANSLYCKE & REESE
TRAVEL INC
WASHINGTON DC
09 91268 2/

AGENT COPY

FOX/DONALD MR

NANJING	CA	1508	Y	18JAN	1025A		RQY			
BEIJING	-	VOID		VOID			VOID			
VOID	-	VOID		VOID			VOID			
VOID		VOID		VOID			VOID			
VOID										

IF EXTS PAY DESIG. CIRCLE NO. OF MDS. 3 6 9 12

RMB 123.00 18JAN NKG CAPEK RMB123.00Y EQUSD/44.00 TTL/USD44.00
USD 44.00 RMB 2.7987

USD 44.00 CHECK

0162X139887
0090059:3584

026 7559367081 0 □

0285

62a

BEST AVA

LABLE COPY

PAN AM WORLD AIRWAYS
ATC FLIGHT COUPON
NANJING
BEIJING
VANSLYCKE G REESID
TRAVEL, INC.
WASHINGTON DC
FOX/DONALD MR
9 JAN 85
CARRIER
FLIGHT/CLASS
DATE
TIME
STATUS
CA
510P
18JAN
1705
OK
ISSUING OFFICE
NANJING
VOID
VOID
VOID
VOID
VOID
TTL/USD744.00
EQUSD744.00
RMB123.00 TBJAN JKU CAPE RMB123.00Y
RMB 44.00 RMB 21/7887
RMB 44.00
CHECK
0265
0162113887
0026 7559367081 4

BEST AVAILABL

E COPY

540

87 No. 540

Supreme Court, U.S.
FILED
OCT 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GENERAL ADMINISTRATION OF CIVIL AVIATION OF THE PEOPLES REPUBLIC OF CHINA, a/k/a CIVIL AVIATION ADMINISTRATION OF THE PEOPLES REPUBLIC OF CHINA or CAAC,

Petitioner,

– against –

LOUISE AGNES BARKANIC, Individually and as Personal Representative of the Estate of PETER PATRICK BARKANIC, Deceased,

GLADYS PATRICIA FOX, Individually and as Personal Representative of the Estate of DONALD BRANFORD FOX, Deceased,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DANIEL F. HAYES, ESQ.*
SALIBELLO, HAYES & ZAHN
Suite 1420
19 Rector Street
New York, New York 10006
(212) 635-9052
Attorneys for Respondents Louise Agnes Barkanic, and Gladys Patricia Fox

* *Counsel of Record*

QUESTIONS PRESENTED

1. Whether an express waiver of sovereign immunity by a foreign sovereign-owned airline in a Foreign Air Carrier Permit is a treaty agreement that the airline retains sovereign immunity for all other claims, in contravention of the Foreign Sovereign Immunities Act?

2. Whether a United States District Court has subject matter jurisdiction under the Foreign Sovereign Immunities Act over a foreign sovereign-owned airline doing business in the United States for claims arising out of a fatal flight for which the American decedents contracted and paid in the United States?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iv

STATEMENT OF THE CASE.....viii

SUMMARY OF ARGUMENT.....ix

REASONS WHY THE WRIT SHOULD NOT BE GRANTED.....1

I. THIS COURT SHOULD NOT CONSIDER THE ARGUMENT THAT THE BILATERAL TREATY BARS ASSERTION OF JURISDICTION BY UNITED STATES COURTS UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT.....1

1. The Petitioner Failed to Raise This Argument Before the Court of Appeals Because The Bilateral Treaty Does Not Address or Govern the Questions of Immunity and Jurisdiction; the FSIA Does.....1

2. The Court of Appeals Correctly Applied the FSIA in its Decision.....10

II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL REQUIRING A DECISION OF THIS COURT.....15

III. THE COURT OF APPEALS WAS CORRECT THAT BY ISSUING TICKETS AND ACCEPTING PAYMENT FOR PASSAGE ON THE ACCIDENT FLIGHT, THE AIRLINE CONTRACTED

WITH THE DECEDENTS IN THE UNITED STATES, AND THAT SUCH CONTRACTS WERE THE NEXUS REQUIRED BY THE FSIA.....21

1. There Was A Contract for Passage Made in the United States.....21

2. The "RQY" Reservation Status Is Irrelevant.....24

3. The Contract Between the Decedents and the Airline Was A Sufficient Nexus With the Claims Asserted in This Case.....27

IV. AN AFFIRMANCE BY THE COURT OF APPEALS WOULD HAVE SERIOUSLY DISRUPTED SETTLED LAW UNDER THE WARSAW CONVENTION AND THE FSIA.....28

1. Warsaw Convention Law Would Have Been Disrupted.....29

2. FSIA Law Would Have Been Disrupted.....34

V. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE JURISDICTIONAL PROVISIONS OF THE WARSAW CONVENTION, GOVERNING INTERNATIONAL FLIGHTS.....35

VI. CONCLUSION.....36

TABLE OF AUTHORITIES

Cases: **PAGE**

Arango v. Guzman Travelers Advisors Corp., 621 F.2d 1371 (5th Cir. 1980)..... 7, 17

Block v Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967).....24, 30

Gemini Shipping v. Foreign Trade Org'n., 647 F.2d 317 (2d Cir. 1981).....18

Gilson v. Republic of Ireland, 682 F.2d 1022 (D.C.Cir. 1982).....16

Harris v. V.A.O. Intourist, Moscow, 481 F.Supp. 1056 (E.D.N.Y. 1979).....19, 20

In re Air Disaster at Riyadh Airport, 16 Av. Cas. (CCH) para. 17,880 (D.D.C. 1981).....19

Ministry of Supply, Cairo v. Universe Tankships, Inc., 708 F.2d 80 (2d Cir. 1983).....17, 28

Sugarman v. Aeromexico, Inc., 626 F.2d 270 (3rd Cir. 1980).....7, 16, 17

Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981).....18

Tigchon v. Island of Jamaica,
591 F.Supp. 765 (W.D. Mich. 1984)..19

Tote v. Iberian International Airlines,
649 F.Supp.41 (E.D.Pa. 1986).....19

Velidor v. L/P/G/ Benghazi,
653 F.2d 812, 820 (3rd Cir. 1981),
cert. dismissed, 455 U.S. 929
(1982).....16

Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne,
730 F.2d 195 (5th Cir. 1984),
reh'g. denied, 734 F.2d 1479 (5th
Cir. 1984).....16, 28

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480
(1983).....10, 11, 18

United States Constitution:
Article I.....10

Treaties:

Agreement Between the Government of the United States of America and the Government of the People's Republic of China Relating to Civil Air Transport, September 17, 1980, T.I.A.S. No. 10326, Av.L.Rep. (CCH) para. 26,321.....*passim*

Convention For the Unification of Certain Rules Relating to International Transportation By Air, 49 Stat. 3000, 49 U.S.C. sec. 1502 et seq. (the "Warsaw Convention")...28, 29, 30, 31, 35, 36

Statutes and Regulations:

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. secs. 1602 et seq..... *passim*

Legislative History:

House Judiciary Committee, *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18, *reprinted in* [1976] U.S. Code Cong. & Admin. News 6604.....7, 27

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. _____

GENERAL ADMINISTRATION OF CIVIL AVIATION OF THE PEOPLES REPUBLIC OF CHINA, a/k/a CIVIL AVIATION ADMINISTRATION OF THE PEOPLES REPUBLIC OF CHINA OR CAAC.

Petitioner,

-vs.-

LOUISE AGNES BARKANIC, Individually and as Personal Representative of the Estate of PETER PATRICK BARKANIC, Deceased, and

GLADYS PATRICIA FOX, Individually and as Personal Representative of the Estate of DONALD BRANFORD FOX, Deceased,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

Petitioner is the commercial airline of the People's Republic of China, and does significant business in the United States through its own employees and through agents. Contracts for air transportation between Nanjing and Beijing for Peter Barkanic and Donald Fox, American citizens residing in the United States, were made and paid for in Washington, D.C. The U.S.-issued tickets were honored by CAAC. Decedents died in the crash of the CAAC aircraft at the intermediate stop of Jinan.

The Court is respectfully referred to the first four paragraphs of the opinion of the Court of Appeals, which are incorporated herein by reference (Petition, pages 2a-4a).

SUMMARY OF ARGUMENT

The Court of Appeals properly applied the Foreign Sovereign Immunities Act to the facts of this case, and found a sufficient nexus between the contracts of carriage made in the United States with the claims for wrongful death to assert jurisdiction. The airline did not raise the Air Services Agreement below because it is silent as to sovereign immunity. The Foreign Air Carrier Permit contains a waiver, not a retention, of sovereign immunity. The Courts of Appeal agree about the application of the Foreign Sovereign Immunities Act. An affirmance of the District Court would have played havoc with settled law under the Warsaw Convention and the Foreign Sovereign Immunities Act.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THIS COURT SHOULD NOT CONSIDER THE ARGUMENT THAT THE BILATERAL TREATY BARS ASSERTION OF JURISDICTION BY UNITED STATES COURTS UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT.

1. The Petitioner Failed to Raise This Argument Before the Court of Appeals Because The Bilateral Treaty Does Not Address or Govern the Questions of Immunity and Jurisdiction; the FSIA Does.

The Petitioner asserts that the Air Transport Services Agreement ("Bilateral Treaty"), "...defines the scope of [the P.R.C.'s] relinquishment of sovereign immunity..." (Questions Presented, I) and thus bars the assertion of jurisdiction over these claims by United States Courts under the Foreign Sovereign Immunities Act ("FSIA").

The Court of Appeals did not consider this argument for the simple reason that the Petitioner did not make it in either court below, and is raising it here for the first time.

CAAC raises this specious argument as a ploy to attract the attention of the Court. This case does not even colorably involve the interpretation of the Bilateral Treaty.

In the Court of Appeals, the Petitioner agreed with the Respondents that, "It is well settled that the Foreign Sovereign Immunities Act ... is the sole basis for federal subject matter and personal jurisdiction over actions against foreign sovereigns or their entities" and that CAAC was a commercial agency or instrumentality of

the People's Republic of China ("P.R.C."). (Brief for Petitioner-Appellee at 10).

In regard to the Bilateral Treaty, CAAC only stated, correctly, that its purpose was to "facilitate international air transportation". CAAC never asserted that the Bilateral Treaty set the only standard - or any standard -against which claims of immunity are to be judged, or that it dealt with the issue of sovereign immunity at all.

The Treaty does not deal with sovereign immunity at all.

Petitioner cites only the vaguest language in the Preamble of the Treaty as support for its novel argument: "develop mutual relations between their countries, to enhance friendship between

their peoples, and to facilitate international air transport...observing the principles of mutual respect for independence and sovereignty, non-interference in each other's internal affairs, equality and mutual benefit and friendly cooperation." Petition, page 8. This is simply diplomatic boilerplate found in every Bilateral Treaty dealing with air rights.

Finding no support in the language of the Treaty, Petitioner attempts by sleight of hand to elevate to the status of a Treaty provision the standard waiver language of the Foreign Air Carrier Permit issued by the Department of Transportation to CAAC and to each

foreign airline. /1.

CAAC then argues, invalidly, that since the express waiver in the Permit does not cover the claims in this action, it has retained immunity for these claims, and indeed for all other claims.

The Bilateral Treaty deals only with foreign air transportation between the United States and the P.R.C. It is not a Treaty which deals with the extent to which each country will or will not grant immunity to the commercial activities of the other. Nowhere in the

---

/1. Each of more than 150 foreign airlines operates here under such a Treaty containing similar boilerplate and must execute such a Permit containing identical waiver language before it can begin operations here. (DOT

Treaty does the P.R.C. reserve all claims to sovereign immunity for its commercial agencies, other than those which it expressly waives.

If the Treaty's silence is construed as an express retention of sovereign immunity for those other operations, and if the Treaty is adjudged to be in derogation of prior federal law, i.e., the FSIA, all foreign sovereign-owned airlines which sell their services in the United States will be granted immunity for thousands of claims now

---

Order to Show Cause, Joint Appendix ("JA") at A-320a).

CAAC names 17 and mentions 133 other such foreign airlines, the vast majority of which are foreign sovereign-owned (*Id.* at A-321a), who so operate in the United States in its brief below (page 32).

considered to be within the ambit of the FSIA.

But the FSIA was clearly designed to encompass the commercial acts of sovereigns, including the sale of services, House Judiciary Committee, *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18, reprinted in [1976] U.S. Code Cong. & Admin. News 6604, 6605 ("House Report"). The sale of airline tickets and the solicitation of passengers for a common carrier by air like CAAC are "commercial activities". *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3rd Cir. 1980); *Arango v. Guzman Travelers Advisors Corp.*, 621 F.2d 1371, 1373 (5th Cir. 1980). And when the statute was passed, each foreign airline was operating here under the authority of a

similar Bilateral Treaty and Foreign Air Carrier Permit.

The Bilateral Treaty says nothing about sovereign immunity. Rather, the Foreign Air Carrier Permit requires, as a precondition of operations rights here, an express waiver of any asserted claim of immunity for claims arising out of foreign air transportation. /2.

CAAC attempts, speciously, to incorporate the Permit into the Treaty, and then speciously and illogically draws inferences from the Permit's waiver language which are wholly unsupportable.

/2. The Treaty is also silent about the requirement for execution of the Permit. If the premise that the Treaty sets forth the

Essentially, it says that since it has not expressly waived its immunity, it retains it: "CAAC may raise the defense of sovereign immunity with respect to operations which are not under the permit". Petition, page 9.

The Petitioner did not make this specious argument to the Court of Appeals, and this Court should not consider it in deciding whether to grant the Petition for Certiorari.

---

standards of immunity is correct, the Permit's waiver requirement must be unenforceable. But Petitioner does not follow the logic of its premise *ad absurdum*.

2. The Court of Appeals Correctly Applied the FSIA in its Decision.

A. *All* claims of immunity made by the commercial airline, CAAC, are to be judged by the Courts of the United States under the standards of the FSIA, by decision of the Congress of the United States, indisputably empowered by Article I of the Constitution. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493-494 (1983).

Disagreeing with *Verlinden, supra*, the Petitioner puts forth the proposition that:

1) CAAC is immune from all claims unless it has expressly waived immunity;

2) CAAC has only waived immunity for claims arising out of foreign air transportation;

3) these claims do not arise from foreign air transportation;

4) therefore, CAAC is immune from suit in the United States on these claims.

This is a false conclusion, since it flows from a false major premise: the Petitioner is not immune from all claims unless it expressly waives immunity. Such an argument simply ignores the existence of the FSIA, which codified the restrictive theory of sovereign immunity, i.e., the principle, long known to American law, that a sovereign will not be granted immunity for its commercial acts, and "[s]hall be liable in the same manner and to the same extent as a private individual under like circumstances". 28 U.S.C. sec. 1606; *Verlinden, supra*, 461 U.S. at 488-489.

The correct analysis is:

1) the Petitioner is only immune from those claims which do not fall within the "exceptions" to immunity of the FSIA, i.e., cases,

-in which the Petitioner has implicitly or expressly waived its immunity, /3; *OR*

-where the action is "based upon", i.e., has a nexus with, a commercial activity of CAAC in the United States (the only ground of decision below), /4; *OR*

-where the action is "based upon" an act performed in the United States in connection with a commercial activity of CAAC elsewhere, /5; *OR*

/3. 28 U.S.C. sec. 1605 (a)(1)

/4. 28 U.S.C. sec. 1605 (a)(2)(Clause One)

/5. 28 U.S.C. sec. 1605 (a) (2) (Clause Two)

-where the actions of CAAC elsewhere have had a direct effect in the United States, /6; *OR*

-several other categories of acts, not relevant to this discussion, /7.

2) these claims arise from acts having a "nexus" with commercial activity of CAAC in the United States;

3) therefore, the Petitioner is NOT immune.

The FSIA has several categories of cases which do not warrant immunity: express waiver is only one of them.

The waiver condition of the Foreign Air Carrier Permit subtracts from the

---

/6. 28 U.S.C. sec. 1605 (a) (2)(Clause Three)

/7. 28 U.S. C. sec. 1605 (a) (3-5).

category of operations for which immunity is theoretically available to CAAC under the FSIA. A waiver cannot *increase* the extent of immunity!

The Treaty is silent as to the immunity of CAAC for claims which will of necessity arise from its commercial operations here. Examples are ordinary torts, contracts made here whose performance is to occur here or abroad [such as for the purchase and delivery of American-made aircraft to the P.R.C.] or contracts for personal air transportation, as herein. The Treaty, therefore, not even colorably conflicts with the standards for immunity set out in the FSIA.

The Court of Appeals correctly applied the FSIA "nexus" requirement to the claims for immunity by CAAC and correctly found that nexus in the making of the contracts of carriage in the United States.

II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL REQUIRING A DECISION OF THIS COURT.

Petitioner argues that there is such confusion over the application of the FSIA that this Court should grant certiorari in this case in order to resolve such confusion.

The truth is that there is no conflict among the Circuits which have decided cases under Section 1605, Clause One of the FSIA, the only ground of jurisdiction considered in this case by

the Court of Appeals. They all agree that if a claim has a "nexus" with commercial activities in the United States of a foreign sovereign-owned commercial entity, then there is no immunity from jurisdiction. *Compare*: *Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne*, 730 F.2d 195 (5th Cir. 1984), *reh'g. denied*, 734 F.2d 1479 (5th Cir. 1984); *Gilson v. Republic of Ireland*, 687 F.2d 1022, 1027 n.22 (D.C.Cir. 1982); *Velidor v. L/P/G/ Benghazi*, 653 F.2d 812, 820 (3rd Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982); and *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3rd Cir. 1980).

The Petitioner has not cited one case in a Court of Appeals which has used a different rationale, or decided a factually similar case differently; and has cited only one, unreported District

Court case on apparently similar facts where an opposite result was reached.

This status of agreement among the Circuits does not warrant review of this case by this Court.

The Second Circuit in its decision herein expressly followed both the rationale and the results of factually similar cases involving foreign sovereign-owned airlines in the Third and Fifth Circuits. *Compare, Arango v. Guzman Travelers Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980); and *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3rd Cir. 1980).

The decision below is consistent with the rationale of other Second Circuit cases. *Compare, Ministry of Supply, Cairo v. Universe Tankships,*

Inc., 708 F.2d 80 (2d Cir. 1983); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981); and *Gemini Shipping v. Foreign Trade Org'n.*, 647 F.2d 317 (2d Cir. 1981); and with the principles and rationales this Court expressed in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

In the other foreign sovereign-owned airline cases cited by the Petitioner, in which immunity was upheld, *the passengers had not purchased their contracts of carriage from the foreign sovereign-owned airline in the United States*; the Court of Appeals emphasized that this was an important basis for its decision: "We repeat that the fact that Barkanic and Fox were not guaranteed passage on a particular domestic flight in China is irrelevant since the tickets

involved here were bought and paid for in the United States and available and used for passage on the fatal flight." Opinion, page 7a.

The Court of Appeals, on this basis, rightly distinguished these cases, *Tigchon v. Island of Jamaica*, 591 F.Supp. 765 (W.D. Mich. 1984); *In re Air Disaster at Riyadh Airport*, 16 Av. Cas. (CCH) para. 17,880 (D.D.C. 1981); *Tote v. Iberian International Airlines*, 649 F.Supp.41 (E.D.Pa. 1986), and the early FSIA case of *Harris v. V.A.O. Intourist, Moscow*, 481 F.Supp. 1056 (E.D.N.Y. 1979). In *Harris*, a non-airline case, decedents were killed in a hotel fire in Moscow. The defendant hotel agency was not the same agency which had solicited American tourists in the United States, and the decedents had contacted Intourist Moscow in the Soviet

Union to book his travel there directly. Thus, *Harris* and this case differ in that in *Harris* the tortfeasor had done no commercial activity in this country and the commercial relationship between the decedent and the defendant did not originate in dealings here.

The Circuit Courts of Appeal have done what the drafters of the FSIA intended: they have created a consistent rationale and a uniform body of law from cases brought under the FSIA.

Since there is no conflict among the Circuit Courts of Appeal, this Court should not grant the Petition for Certiorari.

III. THE COURT OF APPEALS WAS CORRECT THAT BY ISSUING TICKETS AND ACCEPTING PAYMENT FOR PASSAGE ON THE ACCIDENT FLIGHT, THE AIRLINE CONTRACTED WITH THE DECEDENTS IN THE UNITED STATES, AND THAT SUCH CONTRACTS WERE THE NEXUS REQUIRED BY THE FSIA.

1. There Was A Contract for Passage Made in the United States.

Both the District Court and the Court of Appeals rightly found that CAAC contracted with Pan American World Airways to be its General Sales Agent in the United States. The General Sales Agency Agreement expressly and unambiguously empowered Pan Am to appoint ticket agents to issue tickets for passage over the routes of CAAC and to receive revenue for flights on CAAC.

The District Court and the Court of Appeals both found that Barkanic and Fox were traveling aboard Petitioner's aircraft pursuant to tickets which had been issued by Vanslycke & Reeside Travel Agency in Washington, D.C.

The payment of the fares to CAAC in Washington was consideration for a commercial service to be performed by a commercial agency in China. No further compensation was paid besides that which was paid in Washington.

CAAC admitted that it was CAAC policy to accept such tickets, that CAAC received the payment for the decedents' passage which it had set and that CAAC accepted the United States-issued tickets for boarding [CAAC itself produced copies of the tickets which

were surrendered by the decedents in order to board the accident flight].

Thus, the Court of Appeals was correct in its finding that there was a contract formed in the United States, and that:

> CAAC honored the contract it had entered into through the agency of Pan American and the Washington, D.C., travel agent by accepting the U.S.-issued tickets for the passage of the decedents on the date in question... Had, for example, the Chinese airline declined to carry Barkanic and Fox at all, they certainly would have had an action for breach of contract. It follows that there is a sufficient nexus between the airplane crash and the commercial

activity carried on by CAAC in this country.

Opinion, page 6a.

Assuming, *arguendo*, that the ticket agent in this case was the agent of the passengers, there were still contracts of carriage between the passenger and the carrier since the tickets were paid for and delivered. *Block v Compagnie Nationale Air France*, 386 F.2d 323, 332 & 332 n.27 (5th Cir. 1967).

2. The "RQY" Reservation Status Is Irrelevant.

As issued in the United States the tickets' reservation status box read "RQY" and not "OK". This only meant that the airline did not covenant to fly the decedents on flight 1508 of

January 18, 1985, the flight which was originally listed. But it did contract to fly them between Nanjing and Beijing and in fact it honored those contracts by accepting the U.S.-issued tickets for the passage of the decedents between those points on January 18, 1985.

No novation of the contract of carriage occurred in China. The accident flight occurred on the same day, on the same airline, and on the same route as that which was recited on the tickets as they were issued in Washington. The only change was the number of the flight, a circumstance completely within the control of the airline.

If the contract had been for the carriage of goods, rather than human beings, and those goods had been

destroyed in the crash, there can be no doubt that jurisdiction would lie for breach of contract in the United States, regardless of the "reservation status" of the tickets. If CAAC had flatly refused to accept the U.S.-issued tickets for the passage between Nanjing and Beijing, there can be no doubt that on their return the decedents would have had the right to sue CAAC for damages.

There is no rational basis for granting FSIA jurisdiction for the carriage of goods and for failure to carry human beings, but for refusing it for the negligent carriage of human beings.

3. The Contract Between the Decedents and the Airline Was A Sufficient Nexus With the Claims Asserted in This Case.

The FSIA denies immunity to those cases "based upon commercial transactions performed in whole or in part in the United States....", House Judiciary Committee, *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17; See, 28 U.S.C. sec. 1605 (a) (2) (Clause One).

The FSIA does not require that there be, as there was in this case, a contractual relationship between the parties formed in the United States, before jurisdiction under Clause One will lie. As long as there is a connection or nexus with commercial

activity in the United States, jurisdiction lies for claims under both contract and tort theory, including claims where the specific misconduct complained of occurs outside of the United States. *Vencedora, supra*, 730 F.2d at 202; *Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80 (2d Cir. 1983).

Since the commercial activity in the United States providing the nexus need not be as significant as a contract between the parties, *Cairo, supra, a fortiori*, when there is such a contract, as here, the nexus is more than sufficient.

IV. AN AFFIRMANCE BY THE COURT OF APPEALS WOULD HAVE SERIOUSLY DISRUPTED SETTLED LAW UNDER THE WARSAW CONVENTION AND THE FSIA

1. Warsaw Convention Law Would Have Been Disrupted.

A holding by the Court of Appeals that the "RQY" reservation status invalidated the contract of carriage would have played havoc with the settled law of jurisdiction for claims arising not only from "non-Warsaw" air transportation, but also from international carriage under the Warsaw Convention. /8.

/8. Convention For the Unification of Certain Rules Relating to International Transportation By Air, 49 Stat. 3000 et seq. (the "Warsaw Convention"). The Convention does not itself establish a contract between the parties but comes into effect after a contract for international carriage by air has been made between the passenger and the

If CAAC'S proposition, that a schedule confirmation or change abroad amounts to a novation of the contract of carriage, had been approved by the Court of Appeals, there would have been no rational basis for not extending it to Warsaw Convention cases.

According to Article 28 of the Warsaw Convention, there is jurisdiction over a claim for personal injury or death, if the plaintiff brings it, *inter alia*, "where he [the carrier] has a place of business through which the contract has been made." /9.

---

airline. See, *Block v Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967).

/9. The United States is now considering ratification of the Montreal Protocols to the Warsaw Convention, which, if

The phrase, "through which the contract has been made" has always been accepted to mean the place where the tickets were purchased. But if the Court of Appeals had accepted CAAC's argument in this case, to the effect that a change of flight number or reservation status effects a novation of the contract of carriage, it is certain that the many foreign government-owned airlines engaged in "Warsaw" as well as "non-Warsaw" carriage will use every

---

adopted, would permit U.S. citizens to sue foreign airlines in U.S. courts regardless of whether the air transportation has any connection with the United States, so long as the carrier maintains an establishment in the United States. (DOT Order to Show Cause, JA at A-321a).

change of flight number and every other schedule irregularity, whether or not caused by the airline's own actions, to claim that the contract of carriage was made or novated where the irregularity or flight number change occurred, and not in the United States where the tickets were purchased, so as to avoid jurisdiction in the United States. This will severely disturb a settled body of law and the expectations of thousands of persons. /10.

That there were final arrangements

/10. The vast majority of non - U.S. airlines are instrumentalities of foreign governments. (DOT Order to Show Cause, JA at A-321a.) CAAC named 17 and mentioned 133 other foreign airlines which operate in the United States. (Brief of Defendant-Appellee at 32.)

for the passengers to make in China in regard to the actual boarding of a flight is true of any flight. Most carriers require that a passenger arrive at a minimum time before scheduled departure or forfeit his or her reservation (but not his or her right to carriage). It is a common practice in international flights for an airline to require a passenger to reconfirm a reservation for a second leg of a journey after a stopover enroute. That is, the passenger is supposed to make "final arrangements" in regard to the reservation on the second flight.

A decision for the Petitioner by the Court of Appeals would have meant that in every case involving an overseas flight, where a passenger does not fly on the originally scheduled flight, but uses his U.S.-issued ticket on another,

and is injured or killed, the airline could claim that the contract was made not in the United States but in the country where the accident flight originated. For international flights, this would deprive the plaintiff of the Article 28 grant of jurisdiction where "the contract has been made" and clearly would be an unacceptable result, contrary to the meaning of the Convention and to ordinary commercial usage. It is just as unacceptable in this case.

2. **FSIA Law Would Have Been Disrupted.**

To allow the Petitioner immunity on these facts would permit any commercial agency of a foreign government which contracts and receives consideration in the United States, to make some

immaterial change at the place of performance, and assert that a novation has occurred and that it is immune from suit in the United States, where it negotiated the contract and was paid. This is an affront to the restrictive theory of sovereign immunity and the language and purposes of the FSIA.

V. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE JURISDICTIONAL PROVISIONS OF THE WARSAW CONVENTION, GOVERNING INTERNATIONAL FLIGHTS.

Article 28 of the Warsaw Convention is a decision by the international community that *there is a sufficient nexus* between the commercial activity of the carrier in the United States and claims arising out of the carriage purchased, to permit suit in the forum where the contract of carriage is made.

By finding that there was a sufficient nexus with the commercial activities of CAAC in the United States for these claims, since the tickets were purchased here, the Court of Appeals settled a rule which is consistent with the Warsaw Convention and thus is objective, familiar, and fair. It also fulfills the purposes of the FSIA, and should not affront the "sensitivity" of sovereigns who choose to conduct commercial activity by air, since in almost every case those sovereigns (including the P.R.C.) have adhered to the Convention.

VI. CONCLUSION

This Court should not grant the Petition. The Petitioner airline did not raise the Air Services Agreement

("Bilateral Treaty") below because it is completely silent as to sovereign immunity. The Foreign Air Carrier Permit contains a waiver, not a retention, of sovereign immunity.

There is agreement among the Courts of Appeal concerning the application of the Foreign Sovereign Immunities Act.

The Court of Appeals properly applied the Foreign Sovereign Immunities Act to the facts of this case. There is a sufficient nexus between the contracts of carriage made in the United States with the claims for wrongful death to assert jurisdiction.

An affirmance of the District Court would have played havoc with the settled law of jurisdiction under both the Warsaw Convention and the Foreign Sovereign Immunities Act.

Respectfully submitted,

DANIEL F. HAYES, ESQ.*

SALIBELLO, HAYES & ZAHN
Suite 1420
19 Rector Street
New York, New York 10006
(212) 635-9052

Attorneys for Respondents
Louise Agnes Barkanic,
and Gladys Patricia Fox

* *Counsel of Record*